INSTITUTIONAL BALANCE AND DEMOCRATIC LEGITIMACY IN THE DECISION-MAKING PROCESS OF THE EU

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Author's Declaration

I declare that the work in this dissertation was carried out in accordance with the Regulations of the University of Bristol. The work is original, except where indicated by special reference in the text, and no part of the dissertation has been submitted for any other academic award. Any views expressed in the dissertation are those of the author.

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ABSTRACT

Since Maastricht, the 'Europeanisation' of decision-making means that the locus of political control has shifted and the borders of the democratic (Member) State no longer embrace the whole spectrum of individual activity. As a result, the EU legislative process creates a system of legal acts adopted usually by qualified majority voting by institutions that are distant from the citizens of the Member States, but which still directly affect their lives. Inevitably, the redefinition of political boundaries created public anxieties about the legitimate and democratic underpinnings of the Union's decision-making process. The thesis sets out to explore the democratic legitimacy of the EU institutional system with reference to the two overriding principles found in the national political orders, that is, the 'rule of law' and democracy and by focusing on government structures and their interrelationship. In this context, the relationship between the issue of institutional balance and democratic legitimacy is relevant to the issue of how the EU institutions interact in the decision-making process. In the absence of clear separation of powers in the EU treaties, the principle of institutional balance has acted as a substitute with the aim to provide a system of checks and balances that ensures that the system of governance and the exercise of power, therein, respect the 'rule of law' and democracy or, in other words, are both *legally* and *publicly* controlled, thus preserving the democratic legitimacy of a legal order. Namely, whether the way legislative power is allocated and exercised is confined within constitutional limits, based on a set of fixed and identifiable rules and principles and judicial remedies are available to ensure respect for such rules and principles. Also, whether the way legislative power is attributed and exercised allows for the participation of people in the legislative process.

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ABBREVIATIONS

AC	Autonomous Community
AG	Attorney General
BL	Basic Law
BverfG	German Constitutional Court
CCP	Common Commercial Policy
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
COREPER	Committee of Permanent Representatives
CoR	Committee of the Regions
COSAC	Conference of Community and European Affairs Committees of Parliaments of the European Union
ECB	European Central Bank
ECHR	European Court of Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOSOC	Economic and Social Committee
EEA	European Economic Area
EEC/EC	European Economic Community/ European Community
EP	European Parliament
EU	European Union
Euratom	European Atomic Energy Community
EWS	Early Warning System
GAC	General Affairs Council
JHA	Justice and Home Affairs
IGC	Intergovernmental Conference
IIA	Inter-Institutional Agreement
MEP	Member of the European Parliament
MP	Member of Parliament
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation

NP	National Parliament
OTC	Overseas Countries and Territories
PJC	Police and Judicial Cooperation in Criminal Matters
QMV	Qualified Majority Voting
REGLEGs	Regions with Legislative Powers
SpCt	Supreme Court of the United States of America
TEC	Treaty Establishing the European Community
TeCE	Treaty Establishing a Constitution for Europe
TEU	Treaty on European Union
UN	United Nations
UNSCR	United Nations Security Council Resolution
VCLT	Vienna Convention on the Law of the Treaties
WG	Working Group
WP	Working Paper

CHAPTER 1

INTRODUCTION

"The willingness to be ruled is a guarantee of the freedom to rule."
Aristotle, *The Politics.*

One would agree with Joseph Weiler[1] that Maastricht, and its aftermath, is one of the greatest constitutional 'moments' in the history of the European Union, not because of the achievements of the economic and monetary union or the unprecedented opportunities the transformation of the single market created for Europe's citizens. Maastricht was one of the greatest constitutional 'moments' due to the debate that followed the ratification process which had in itself a transformative impact; public opinion in the Member States was no longer willing to tacitly accept the orthodoxies of European integration and the choices of the European political classes. And this was due to Maastricht's one further, very significant implication; the European Union's evolution into a 'regime' of multilevel governance with a deepened and widened policy remit raised concerns about its legitimate and democratic underpinnings.

In the Member States there is a presumption that national governments are democratically legitimate, despite the fact that they depict, at least in some Member States, formal and informal arrangements which are democratically deficient.[2] If democratically deficient arrangements are found both at EU and national levels, why it is the Union's - and not the Member States' - democratic legitimacy that is called into question? In the EU, the system of governance is based on the 'institutional triangle' of the Commission, the Council and the European Parliament, flanked by two more institutions: the European Court of

[1] J.H.H. Weiler, *The Constitution of Europe*. Cambridge University Press, 1999, pp.3-4.
[2] Notably, in the UK, legislation passes through a second, unelected chamber (the House of Lords) for amendments and approval. In Greece, unelected academics often become members of the Government as ministers.

Justice and the European Council. The Commission traditionally upholds the interests of the Union and initiates legislation with no responsibility for its outcome, the national governments are represented in the Council, the major legislator applying qualified majority voting in many policy areas, and the European Parliament which is directly elected by citizens but with legislative functions far from assuming the overall responsibility of national parliaments. As Karlheinz Neunreither rightly points out,[3] the main shortcoming of the Union is that, unlike national governments, there is no political leadership that is popularly authorised, no executive that depends on a majority and no formal function of opposition which forces the government - or the system of governance- to elaborate alternative policies within the sets of institutions provided to this end. Whereas national politics are dominated by the choice of governments within more or less agreed political systems, the EU periodically calls upon the public or its representatives to authorise redesigns of its institutional system.[4] Therefore, a key difference between the Member States and the EU consists in the fact that, while in the national political orders there are periodic opportunities to express consent by choosing leaders through voting, the EU focuses the politics of consent rather on institutional design and the attribution of powers under that design.

As the Union accrues powers to produce legislative acts that directly affect the lives of citizens, there are public anxieties defined primarily by the complaint that the EU institutions and decision-making are far removed from its citizens and are devoid of public influence and involvement. Therefore, the debate on the lack of democratic input narrows down to the institutional setting of the Union, where the focus is on government structures and their interrelationship. The relationship between institutional balance and democratic legitimacy is relevant to the issue of how the EU institutions interact in the decision-making process. In the absence of clear separation of powers in the EU treaties, the principle of institutional balance has acted as a substitute with the aim to provide a system of 'checks and balances' that ensures that the system of governance and the exercise

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[3] K. Neunreither, 'Governance without Opposition: The Case of EU', (1998) 33 Government and Opposition 419-441, at pp.420-423 and 434.
[4] Ch.Lord, *A Democratic Audit of the European Union*, Palgrave, 2004, p.75.

of power, therein, are both *legally* and *publicly* controlled, thus preserving the democratic legitimacy of the legal order. Namely, whether the way legislative power is allocated and exercised is confined within constitutional limits, based on a set of fixed and identifiable rules and principles and judicial remedies are available to ensure respect for such rules and principles. Also, whether the way legislative power is allocated and exercised allows for the participation of people in the legislative process.

The thesis will attempt an internal evaluation of the European Union's institutional system with specific reference to the institutional relations of the five 'cardinal' institutions (the Council, the Commission, the European Parliament, the Court of Justice and the European Council). The analysis will focus on how these are organised, function and interact in their legal capacity. Whether the manner in which power is shared in the decision-making process privileges particular institutions over others, especially executive (the Council, the Commission and the European Council) over parliamentary and what the implications are. Certainly, the thesis is a reaction to the perception that greater involvement of the European Parliament in the legislative process will enhance its democratic legitimacy, since it is the only publicly elected EU institution. Moreover, as the Union is a multilevel system of governance, decision-making at the EU level exists in tandem with the lower tiers. What will further be explored is how constitutional rules on the attribution of powers and the requirements of decision-making at EU level have impacted on the competence exercise within the national legal orders, with specific reference to national and regional parliaments.

Institutional balance will be studied both as a political and legal principle. As a political principle, it reflects the empirical reality of the Union's institutional structure which is characterised by a proliferation of actors. The premise of this approach is that since each institution, at least in theory, represents a different constituency, the notion of institutional balance can be presented as a way of ensuring adequate participation and representation of different constituencies within the EU. As a legal principle, it was developed by the Court of Justice to regulate interinstitutional relations. Along with fundamental rights, institutional

balance is part of the Court's adjudication on 'principles' with the aim to provide procedural guarantees of legality and subjective guarantees of democracy. The thesis will explore how this jurisprudence has led to the judicialisation of law-making and how that has affected democratic legitimacy. The issue of institutional balance can also be traced in the procedural mechanisms, found in the treaties, through which powers are exercised in the EU. It is further characterised by an inherent institutional tension between intergovernmentalism and supranationalism. The tension is reflected in features such as the complicated voting rules, the maze of intricate procedures, the pillared structure, which partly determine the influence of the different institutional actors. In addition to formal rules, it is further defined by informal institutional practices which may occur outside the constitutional framework of the EU. Therefore, an examination of the formal and, in places, informal aspects of the Union's institutional structure is attempted with the aim to identify salient features of the legislative process that affect its democratic legitimacy.

The issue of 'legitimacy' generally and especially within the EU context is multifaceted and wider than the issue of *democratic* legitimacy and has been the subject of research across disciplines. Most contributions are from the political science and analyse legitimacy in the context of performance, efficiency, effectiveness, identity or concentrate on a comparison of these different 'vectors' of legitimacy. They further evaluate legitimacy in terms of an 'input/output' dichotomy.[5] Also, a plethora of political science and constitutional theory exists on the topic in terms of 'polity' legitimacy. Polity legitimacy concerns the subjects (how citizens are defined) and the sphere (the policy areas and the geographical boundaries where political power is exercised) of a polity, as well

[5] Input legitimacy refers to who is involved or represented in an institutional system and output legitimacy refers to the outcomes or results of an institutional system, in terms of their appropriateness and acceptability. H.Wallace, 'Designing Institutions for an Enlarging European Union', in *Ten Reflections on the EU Constitutional Treaty for Europe*, B.deWitte (ed.), 2003, p.88, CONV 703/03, Study by the EUI presented by Vice-President Amato, 02.04.2003. D.Beetham and Ch.Lord, *Legitimacy and the EU*, Longman, 1998. D.Obradovic, 'Policy Legitimacy and the European Union', (1996) 34 JCMS 191-221. Ch.Lord and D.Beetham, 'Legitimizing the EU: Is there a "Post-parliamentary Basis" for its Legitimation?', (2001) 39 JCMS 443-462, pp.444-5. F.Scharpf, 'Economic Integration, democracy and the welfare state', (1997) 4 JEPP 18–36. M.Jachtenfuchs, Th.Diez and S.Jung, 'Which Europe? Conflicting Models of a Legitimate Political Order', (1998) 4 European Journal of International Relations 404-445. Ch.Lord and P.Magnette, 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU', (2004) 42 JCMS 183-202.

as the need to justify the existence of a polity. It relates to the extent to which entities meet certain minimal conditions of political community. The present analysis will be confined to the issue of 'regime' legitimacy, a narrower concept that refers to the nature and the workings of the institutional structure.[6] Although 'regime' legitimacy has an undeniable correlation with 'polity' legitimacy, any account of the evolution of the EU as a polity, any analysis on its constitutional finality, is beyond the intended scope of the current work.

And within the context of 'regime' legitimacy, the examination will be based on the explicit comparative pattern of institutional balance and democratic legitimacy. Admittedly, institutional balance is a threefold concept; it refers to the relationship between the Member States and the EU, among the Member States in the EU institutions (patterns of influence between the small and larger Member States) and between the EU institutions. Despite the abundant and versatile nature of the topic, the author is compelled, by restrictions of space and time, to focus only on particular aspects of the relationship between the Union's institutions, leaving the prospects open for future analysis. Any reference to the national (and subnational) orders is only indicative of the very essence of the Union's multilevel governance system. As European integration is entangled in the mainstay of national democracy, one cannot establish the democratic legitimacy of the Union's institutional framework without taking into account the lower tiers of governance. It is not treated as an examination of the allocation of competences between the EU and its Member States, but rather of how the allocation of powers within the Union affects the attribution of powers within the national legal orders, because the object of the study is purely the relationship between the EU and its citizens.

The thesis sets out to explore the democratic legitimacy of the Union's regime with reference to the two overriding principles found in the national political orders, that is, the 'rule of law' and democracy. So, the first theoretical

[6] The distinction between regime legitimacy and polity legitimacy (see below) was advanced by R.Bellamy and D.Castiglione, 'Normative Theory and the EU: Legitimising the Euro-Polity and its Regime', in *After National Democracy*, L.Tragardh (ed), Hart Publishing, 2004, pp.12-13 and N.Walker, 'The White Paper in a Constitutional Context', this paper is a part of contributions to the Jean Monnet Working Paper 6/01 Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance.

assumption is that legitimacy needs normative justification.[7] Legitimacy as a 'rule of law' principle is important, because law has always been a basic instrument of the national political system and a symbol of the development of the European integration. Law is the basis of the Union's institutional system, as it lays down the procedures for decision-making and regulates the relationship between the institutions. However, norms are not value free; hence, the second theoretical assumption is that norms have to be underpinned by the value of democracy. In order to explore if and to what extent the Union is democratic as a regime, the democratic standard will be identified on the basis of defining features and principles.

Democracy is a highly elusive concept; it is contested and highly controversial. It means different things to different people. As a result, there is no shortage of scholarly literature on democracy, or disagreement for that matter over how it should be defined.[8] Due to the inherent difficulty in the lack of academic consensus as to the conceptual ambit of democracy and in the fact that these studies must reinforce that particular conception of democracy which they embrace, unravelling concepts of democracy or the complexity that underlies academic debates is beyond the scope of this thesis. Besides, there is hardly any consensus among scholarship about the model of democracy appropriate for the peculiar EU system of governance and such scholarship has as an object the ultimate evolution of the EU as a polity. Besides, as the current study is not about the finality of the Union and the models it should embrace, including the democratic model appropriate for a post-national political entity (the Union), the notion of democracy employed is rather akin to the one found in western liberal democratic states.

It is not always simple to apply statal features of democracy to the EU, a non-state political system. However, there is often the temptation in scholarly and political debate to move too quickly from the reasonable claim that the EU is a non-state political system to the conclusion that the EU, due to its special nature,

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[7] Fr.Barnard, *Democratic Legitimacy-Plural Values and Political Power*, McGill-Queen's University Press, 2001, p.30.
[8] A.Verhoeven, *The EU in Search of Democratic and Constitutional Theory*, Kluwer Law International, 2002, p.3. D.Obradovic, op.cit. n.5, p.194.

should conform to a 'philosophical' standard of democracy, in order to reach an acceptable democratic state. Apart from being elitist and highly 'utopian', such standard does not correspond to the everyday reality of the EU governance. Above all, the EU is a polity in which authority and decision-making is shared across multiple levels of government. Governing institutions in the Member States are limited in how they can shape the standards by which they are judged. There would be little pragmatism in adapting democratic ideas to the EU content, if these were seriously at odds with the way in which national polities actually operate and the way people have accepted that their systems operate.[9] These considerations are significant, when one comes to think about the nature of the democratic regime which does and should operate in the EU. Besides, when one refers to the democratic legitimacy of the system, the Union's regime, this possesses an important formal-institutional dimension. Hence, the examination is intended as a testimony of the routes taken by the EU itself; the choices made by the EU regarding the nature of democracy appropriate for its legal order, the democracy as reflected in its formal and empirical institutional reality. Ultimately, these are the choices made and endorsed by the Member States themselves.

Although it is not always feasible to avoid some degree of theoretical commentary due to the very nature of the topic (democratic legitimacy), a conscious effort has been made not to engage in any theoretical approach to the issue. A formal, legalistic approach will be adopted instead, focusing on questions of structure and procedure in the formulation of laws. Institutional reforms will be unfolded in a legal setting and according to formal constitutional arrangements, relevant court judgments and informal processes, the interplay of interinstitutional relations as well as informal politics. The task will take the form of a case study of the Treaty of Nice with an occasional retrospective reference to the Maastricht and Amsterdam provisions, whenever it is deemed necessary to illustrate the innovations brought about by the 1996 and 2000 Intergovernmental Conferences. The task will also project the legal analysis into the recent post-

[9] Ch.Lord and D.Beetham, op.cit. n.5, pp.443-5. P.Craig, 'The Nature of Community: Integration, Democracy and Legitimacy', in *The Evolution of EU Law*, P.Craig and G.de Burca (eds), OUP, 1999, pp.16 and 22.

Nice constitutional and EU governance debates to assess whether the new constitutional and institutional environment infused the Union's legislative process with democratic legitimacy and whether it achieved popular consent as to the redesign of the regime and the attribution of powers therein. A general reference will be made to the pillared structure of the EU, but the analysis will be confined to the first pillar, which will serve as the testing ground. Also, due to restrictions, the analysis will not include any comitology considerations.

The law is stated as approximately at the end of March 2006.

CHAPTER 2

DEMOCRATIC LEGITIMACY: THE EUROPEAN DEBATE

2.1 Introduction

As with any political system, the European Union (EU) has the power to make laws and devise policies that affect the lives of citizens, the Union citizens. Yet, it is difficult to place the EU legal order in the international arena as well as define its boundaries and relationship with other legal orders. As to the perception of the Union by the public, opinion polls indicate that its institutional system is too intricate and elite-driven. There is very little awareness about EU policies and decision-makers.[1] The EU was created by democratic sovereign states with the purpose of bringing peace and stability in the world and for a long time it derived its legitimacy as an international organisation indirectly from the Member States. However, its development into a 'regime' with a deepened and widened policy remit raised concerns about its legitimate and democratic underpinnings. Are the Union, its objectives and policies shaped by the two overriding principles found in the national political orders, that is, the 'rule of law' and democracy? In this context, the debate on the democratic legitimacy of the EU legislative process becomes relevant, as legitimacy is not an issue of compliance solely with the 'rule of law' principle, but also with the institution of democracy.

This chapter will examine the relevance of the 'rule of law' and democracy to the Union's institutional system and decision-making process. It will explore the constitutional and public anxieties with respect to the democratic legitimacy of the EU institutional structure as well as the reasons why the manner in which

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[1] How Europeans see themselves-Looking through the mirror with public opinion surveys. European Documentation Series, Office for Official Publications of the European Communities, Luxembourg, 2001. Eurobaromeler 56, *Public Opinion in the European Union*, European Commission, April 2002. Flash Eurobaromeler 159, *The Future European Constitution*, February 2004.

legislative powers are allocated among the EU institutions matters to the democratic quality of the Union legal order.

2.2 From policy to polity: democratic legitimacy and European integration

Widespread preoccupation with democratic legitimacy is a fairly recent phenomenon. The issue burst suddenly on the agenda of the Union's institutional reform subsequent to the Maastricht ratification crisis of the early 1990s,[2] but was not in fact expressly identified as a priority by the 1996 and 2000 Intergovernmental Conferences (IGCs). Enhancement of the legitimacy of the EU was not part of the 1996 IGC agenda, although it would appear as a central theme in the reports of the institutions to the Reflection Group which shared a concern, largely a response to the TEU ratification process, about the standing of the European project in the eyes of the European citizen.[3] Indeed, in the Reflection Group's Report to the Conference 'the objective of the 1996 reform, given the challenge of enlargement, was to ensure that the Union functioned efficiently and with legitimacy: in short, the purpose was to improve the quality of the way the Union works'.[4] The 2000 IGC set out to resolve the institutional issues left open by Amsterdam and that needed to be settled before enlargement. Hence, the agenda revolved around reforms that would pertain to the efficient operation of the institutions and the effectiveness of decision-making in an enlarged Europe. There are very few express references to legitimacy, while 'acceptability' appears as a standard for the operation of both the Union institutions and decision-making.[5]

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[2] Ch.Lord, *A Democratic Audit of the European Union*, Palgrave, 2004, p.3. G.Majone, 'Europe's "Democratic Deficit": The Question of Standards', (1998) 4 ELJ 5-28, p.12.
[3] G.deBurca, 'The Quest for Legitimacy in the EU', (1996) 59 MLR 349-376, p.355.
[4] 1996 Intergovernmental Conference. Reflection Group Report. General Secretariat of the Council of the European Union, Brussels, December 1995.
[5] Portuguese Presidency Report, SN/1080/1/00. Santa Maria Da Feira European Council Conclusions, Nr 200/1/00. J.Wouters, 'Institutional and constitutional challenges for the EU–some reflections in the light of the treaty of Nice', (2001) 26 ELR 342-356, pp.344-5.

Eventually, official acknowledgement of the significance of an active citizenry in endorsing the policy choices made at Union level marked a direct link between democratic legitimacy and institutional reforms. Events like the low turn-out in European Parliament (EP) elections and the rejection of the Treaty of Nice in the first Irish referendum led to the relaunching of the debate on the future of the EU with a view to bringing the Union closer to its citizens via the consolidation and strengthening of democratic legitimacy.[6] The 2000 Nice European Council in its Declaration 23 recognised the need to improve and monitor the democratic legitimacy and transparency of the Union and its institutions in order to bring them closer to the citizens of the Member States. The signatories of the Laeken Declaration, annexed to the Conclusions of the European Council, aware of the close link between the legitimacy of the European project and the democratic guarantees to its exercise, invited the Convention to reflect on different ways to increase the democratic legitimacy of the Union.[7] In this context, a review of the EU decision-making process and the way the institutions function was considered necessary to overcome the increasing citizen alienation.

Although the Union has always been a contested political entity, it is largely since Maastricht that the debate on the EU has been in terms of a 'crisis' of legitimacy exacerbated by the public opposition reflected in the results of the Maastricht referenda. The Treaty of Maastricht and the difficulties experienced in subsequent referenda raised fundamental questions about the ultimate goals and methods of European integration, while the crisis of the Santer Commission -in 1999 - created unease over the propriety of the institutional mechanisms employed to govern it.[8] To Paul Craig, integration and democratic legitimacy are related. The latter only becomes relevant according to the nature of EU integration. Indeed, as long as there was technocratic, intergovernmental

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[6] Cardiff European Council Conclusions of 15-16 June 1998, Nr.00150/1/98 REV1. EP Resolution B4-0966 on preparations for the meeting of the heads of state and government on the EU's political future to be held in October 1998, OJ C341/128, 09.11.1998.

[7] Nice European Council Conclusions, Nr. SN400/1/00, 08.12.2000. Laeken Declaration-Annex I, Presidency Conclusions, European Council Meeting in Laeken, 14 and 15 December 2001, SN 300/1/01 REV 1. K.Lenaerts and D.Gerard, 'The structure of the Union according to the Constitution for Europe: the emperor is getting dressed', (2004) 29 ELR 289-322, p.318.

[8] G.deBurca, op.cit. n.3, pp.349-50. A.Follesdal, 'Legitimacy Theories of the European Union', ARENA WP04/15. R.Bellamy and D.Castiglione, 'Normative Theory and the EU: Legitimising the Euro-Polity and its Regime', in *After National Democracy*, L.Tragardh (ed), Hart Publishing, 2004, p.9. J.Wouters, op.cit. n.5.

cooperation based largely on economic apolitical objectives with peace, stability and welfare as overall benefits to citizens, the integration process derived its indirect legitimation from the democratic character of the Member States, diminishing the importance of democratic institutions at EU level.[9] For many decades, this elitist project failed to raise basic questions about its democratic and legitimate underpinnings. As long as people did not perceive themselves as being directly affected by European decisions, they were willing to uncritically accept, although not necessarily embrace, EU policies. Hence, European governments had long pursued integration assuming that the public gave them a 'permissive consensus' toward deeper cooperation.[10] But this state-centric approach was challenged by the new EU regime of multilevel governance created at Maastricht by the Treaty on European Union (TEU), where the EU institutions gained independent influence in policy-making far from their previous role as agents of state executives. The popular and legal reception of the Maastricht Treaty challenged the assumption that policy makers could assume the 'permissive consensus' of the public.[11]

Just what kind of political and legal order is emerging from the process of integration? The distinctive nature of decision-making, particularly within the first Union pillar, indicates that the EU is perceived as something more than a traditional international organisation. As Brigid Laffan observes, scholars of integration have always been confronted and challenged by the 'betweenness' of the EU, 'as it hovers between politics and diplomacy, between government and governance while it is characterised by a considerable ambiguity'.[12] But if the Union is not a typical international organisation, then what exactly is it? Existential questions about its nature have failed to produce a single definition. To set the conceptual framework of the current analysis, the EU is seen as a supranational entity. It is not easy to determine with certainty what

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[9] P.Craig, 'The Nature of Community: Integration, Democratic and Legitimate', in *Evolution of EU Law*, P.Craig and G.de Burga (eds), OUP, 1999, pp.2, 11 and 17. K.Lenaerts and M.Desomer, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy', (2002) 39 CMLR 1217-1253, p.1223. G.Majone, op.cit. n.2.

[10] D.Obradovic, 'Policy Legitimacy and the EU', (1996) 34 JCMS 191-221, p.192. A.Follesdal, op.cit. n.8.

[11] P.Craig, op.cit. n.9. Ch.Lord, op.cit. n.2.

[12] B.Laffan, 'The EU: a distinctive model of internationalization', (1998) 5 JEPP 235-253, pp.236 and 241.

supranationality is, a notion, arguably, as elusive as the EU polity itself.[13] It could be defined as an arena of policy-making with autonomous institutions that adopt binding decisions whose enforcement is not dependent on the peculiarities of the constitutional orders of the Member States (monist and dualist systems).

The Union is also a polycentric polity possessing a multilevel policy 'regime'. EU integration could, therefore, be seen as a polity creating process in which authority and decision-making are shared across multiple levels of government – subnational, national and supranational.[14] While national governments are formidable participants in EU policy-making, control has slipped away from them to supranational institutions, so national institutions have lost some of their former authoritative control over individuals and their respective territories. In short, the locus of political control has changed. Such limitation of sovereignty or transfer of powers from the Member States to the Community was said to be 'within limited fields'.[15] Still, individual state sovereignty is diluted by collective decision making among national parliaments and the autonomous role of the EP, the Council, the Commission and the Court of Justice.[16] We have a redefinition of political boundaries in Europe, or the 'Europeanisation' of decision-making, where the European and not the national political system becomes the unit of the policy process. The Union is not just a policy generating process, but a polity, a form of direct governance in its own right. Hence, the Union deals with issues and policies at the heart of government,[17] it is a well-developed legal system with its own legislature, a comprehensive set of rules on how legislation is to be made and judicial bodies with exclusive jurisdiction to interpret Community law.

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[13] The term 'supranational' was used in the original ECSC Treaty. Article 9(5) provided, *inter alia*, that the members of the High Authority 'shall refrain from any action incompatible with the supranational character of their functions'. It was later repealed by the 1965 Merger Treaty. Such obscure an expression was said to have been used to avoid controversial expressions, like 'federal'. H.Schermers and N.Blokker, *International Institutional Law*, Martinus Nijhoff Publishers, 2001, p.41.

[14] R.Bellamy and D.Castiglione, op.cit. n.8, p.10.

[15] Case 26/62 *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1. Case 6/64 *Costa* v. *ENEL* [1964] ECR 585. However, the ECJ referred to the limitation of sovereign rights 'in ever wider fields': Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of EFTA, on the other, relating to the creation of the EEA*, [1991] ECR I-6079, para.21.

[16] G.Marks, L.Hooghe and K.Blank, 'European Integration from the 1980s: State Centric v. Multi-level Governance', (1996) 34 JCMS 341-378, pp.342-3.

[17] D.Obradovic, op.cit. n.10, pp.207-8.

With the entry into force of the Treaty on European Union, European integration has amassed an ever-widening range of policy competence[18] and expanded dramatically both in scope and into new policy areas to embrace every aspect of the economic, political and social life of the Member States, followed by the extension of qualified majority voting. Quite apart from the traditional treaty amendments, legislative powers have been further increased by court judgments, like, for instance, by creating the doctrine of implied powers which has rendered it increasingly difficult to delineate competences between the EU and the Member States.[19] Moreover, the Treaties have unique constitutional attributes akin to the supranational nature of the Union. These include the preemption of national by supranational competence in a wide range of areas, the supremacy of EC law over national law and the bestowing onto all legal and natural persons rights which can be enforced by the ECJ and national courts.[20] As a result, the legislative process at EU level creates a system of legal acts adopted usually by qualified majority voting, which is externally imposed on Member States by institutions that are distant from their citizens, whereas the ever-expanding policy fields at EU level require a continuous process of institutional reform to cope with such expansion.

2.2.1 The constitutional transformation of the 'new' legal order

The scope of the Union's normative authority has increased steadily since its inception in the 1950s through a piecemeal, but continuous, process of treaty reform and the expansive interpretation of Community competences by the ECJ. By describing the Union as something more than a mere international organisation, a constitutional polity in its own right, a self-legitimating,

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[18] Ibid, p.192.

[19] Doctrine of 'parallelism' or ERTA doctrine which asserts that the competence of the Community to enter into international agreements should run in 'parallel' with the development of its internal competence: Case 22/70 *Commission v Council* [1971] ECR 263.

[20] M.L.Fernandez-Esteban, *The Rule of Law in the European Constitution*, Kluwer Law International, 1999, pp.12-13.

autonomous level of governance, the ECJ effectively defined the constitutionalisation of the EU.[21] It declared early in the integration process that the Community constitutes a new legal order of international law 'for the benefit of which the states have limited their sovereign rights'.[22] *By contrast with* - emphasis added - ordinary international treaties, the EEC Treaty created the Community which is an autonomous legal system, emancipated from international law, with its own institutions and powers to produce law, that is said to be directly applicable and supreme over national law and which bestows rights and imposes obligation on both the Member States and their citizens.

Crucial to the 'transformation argument' is not just the express reference to its constitutional character by the Court, but mostly the latter's dialectics beginning with the doctrines of *supremacy* and *direct effect* and proceeding to the interpretation afforded to article 234 (ex 177) EC. The doctrine of supremacy lays down the rule that in any conflict between a directly effective EC legal norm and a norm of national law, the EC norm must be given primacy. The doctrine of direct effect holds that a provision of EC law can confer on individuals rights that public authorities must respect and which must be protected by national courts.[23] During this period, the Court declared that treaty provisions[24] and directives[25]

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[21] By 'constitutionalisation' is meant the process by which the treaties evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons, and entities, public and private within EC territory. Put differently, it is the process by which the sources of EU law – the treaties, secondary legislation, and the jurisprudence of the ECJ - have penetrated into national legal systems. A.Stone-Sweet, 'Constitutional Dialogues in the European Community', in *The European Courts and National Courts-Doctrine and Jurisprudence*, A.M.Slaughter et. al. (eds), Hart Publishing, 1998, p.306. R.Bellamy and D.Castiglione, op.cit. n.8, p.29. F.R.Liorente, 'Constitutionalism in the "Integrated" States of Europe', JMWP 5/98. P.Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the EC', (1999) 99 Columbia Law Review: 628-738, pp.635-6.

[22] Case 26/62, op.cit. n.15. Case 6/64, op.cit. n.15. Opinion 1/91, op.cit. n.15. The Court has been criticised for rephrasing ordinary principles of international law due to its inadequate idea on the latter. *Van Gend* was not merely about the Court's idea of the Community legal order. It was also about the Court's idea of international law. Direct effect made the Community legal order 'new' because, in the Court's view, international law did not have direct effect. Yet, direct effect has always been a principle found in international law and therefore does not render the EC unique and separate from international law. O. Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Order', (1999) 10 EJIL 763-791, p.766.

[23] A.Stone-Sweet, op.cit. n.21.

[24] Case 26/62, op.cit. n.15. Case 6/64, op.cit. n.15. Case 70/77 *Simmenthal v Amministrazione delle Finanze dello Stato* [1978] ECR 1453. In the TeCE the primacy of EU law is constitutionalised and reflects existing case law of the Court of Justice and the Court of First Instance: Declaration on Article I-6.

[25] Case 41/74 *Van Duyn* [1974] ECR 1337.

were directly effective and underlined the direct effect of regulations.[26] In 1983,[27] the doctrine of indirect effect was established followed, in 1990, by the doctrine of governmental liability.[28] In *Les Verts*,[29] it emphasised that the Community is based on the 'rule of law' and, therefore, the Member States and the EC institutions may not avoid (judicial) review to determine whether the measures adopted by them are in conformity with the 'constitutional charter', the Treaty. Therefore, the Union is portrayed as a constitutional order with the 'rule of law' as a basic constitutional guarantee.

Although the EU's legitimacy rests on successive amendments of the founding treaties and their subsequent ratification by the Member States in accordance with their constitutional requirements, the troubling aspect of the constitutionalisation process of the EU by the Court is the absence of a democratic relationship with the peoples of the various Member States. The transformation of the European legal system was orchestrated by the ECJ through bold legal interpretation by asserting the direct effect and supremacy of European law over national law. The critical change involved the 'special' and 'original' nature of the Treaty of Rome which created a new legal order.[30] The ECJ attempted to circumvent the absence of democratic legitimacy in the EC through the rhetoric of its constitutional character 'based on the rule of law', in which the Court itself served as the ultimate legitimating mechanism, rather than on democratic control.[31] In effect, the Court asserted that institutional legitimacy results primarily from forms of legal rather than democratic control. This alleged

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[26] Case 39/72 *Commission v Italy* [1973] ECR 161.
[27] Case 14/83 *Von Colson* [1984] ECR 1891.
[28] Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.
[29] Case 294/83 *Les Verts v. European Parliament* [1986] ECR 1339, para.23. J.C.Piris, 'Does the EU have a Constitution? Does it Need One?', JMWP 5/00.
[30] K.Alter, *Establishing the Supremacy of European Law*, OUP, 2001, pp.1-2 and 208.
[31] Opinion 1/91, op.cit. n.15. A.Verhoeven, *The EU in Search of Democratic and Constitutional Theory*, Kluwer Law International, 2002, pp.63-4. To R.Bellamy and D.Castiglione, the Court wished to make itself the guarantor of external polity and regime legitimacy of EC law, taking for granted that the EC possessed internal legitimacy as a distinct sphere (legal order) with a determinate aim to secure internal market operation: R.Bellamy and D.Castiglione, op.cit. n.8, pp.26-7. The level of constitutionalisation can only be measured by how national courts have actually received this jurisprudence. However, the confrontation of the ECJ by national courts is outside the main scope of the present thesis, which seeks to present the bottom line, that is, constitutionalisation has taken place mainly due to the ECJ's interpretation of the treaties.

self-professed constitutional nature of the EU gave rise to intense debate[32] on the nature and the democratic legitimacy of the polity.

Regardless of the academic controversy on whether the Union has transformed from an international into a constitutional legal order situated outside the system of international law altogether, the EU has evolved into something different to a mere subsystem of international law. It is often accepted as being *sui generis* and the transformation of the European legal system created a structural change in the way the legal (and political) process works in Europe.[33] In assessing its uniqueness, certain attributes seem to stand out: its institutional set-up ensures that action by the EU is reflected in or influenced by Union interests, as laid down in its treaty objectives; all Member States are bound to accept the exclusive jurisdiction of the Court of Justice to resolve disputes relating to Community law; Community legislation is directly enforceable in national courts. The twin pillar of the Union's sovereignty as established by the Court – direct effect and supremacy- has rendered Community law part of the national legal structure to be applicable and enforceable as the internal law of the Member States. As Judge Federico Mancini[34] wrote: 'But if the European Community still exists in 50 or 100 years from now, historians will look back on *Van Gend* as the unique judicial contribution to the making of Europe'.

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[32] A comprehensive analysis of whether the Community legal order constitutes a subsystem of international law or whether it is entirely separate from public international law is again outside the main scope of the current work. See among many contributions on this subject, D.Wyatt, 'New Legal Order, or Old?', (1982) 7 ELJ 147-166. B.deWitte, 'Rules of Change in International Law: How Special is the European Community?', (1994) 25 NYIL 299-334. T.Hartley, *Constitutional Problems of the EU*, Hart Publishing, 2000, chapter 7. J.H.H. Weiler, 'European Constitutionalism: in Search of Foundations for the European Constitutional Order', in *Constitutionalism in Transformation*, R.Bellamy and D.Castiglione (eds), Blackwell Publishers, 1996, p. 105. T. Hartley, 'National Law, International Law and EU Law – How do they relate?', in *Asserting Jurisdiction. International and European Legal Perspectives*, P.Capps, M.Evans and St.Konstadinidis (eds), Hart Publishing, 2003. J.H.H.Weiler and U.R.Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in *The European Courts and National Courts – Doctrine and Jurisprudence*, op.cit. n.21. A.Weale, 'Democratic Legitimacy and the Constitution of Europe', in *Democracy and Constitutional Culture in the EU*, R.Bellamy, V.Bufacchi and D.Castiglione, Lothian Foundation Press, 1995.

[33] K.Alter, op.cit. n.30, pp.208 and 210.

[34] F.Mancini and D.Keeling, 'Democracy and the European Court of Justice', (1994) 57 MLR 175-190, p.183. O.Spiermann, op.cit. n.22, p.766.

A real concern in the whole transformation debate seems to be the lack of a constitutional theory to sustain the Union's alleged constitutional existence, an element which is also reflected in the lack of academic consensus as to the EU's nature as a juridico-political system or organisational structure.[35] This is exacerbated by the lack of legal personality. Treaty renegotiations have failed to explicitly endow the Union with fully-fledged legal personality. The reluctance to resolve the issue of the EU's legal personality indicates that the Member States are unwilling to furnish the former with independent legal capacities. Since the Member States' intention as to what to make of the EU polity is inconclusive, it is difficult to locate EU law and its legal set up in the international legal order as well as define the boundaries between itself and other legal orders. In this context, the debate of the democratic legitimacy of the EU legislative process becomes relevant. If the EC has long been recognised as a subject of international law, an ambiguity remains as to the EU's legal capacity.[36] The Convention Working Group on Legal Personality considered that 'all too often' the current ambivalent situation leads to confusion regarding the European system, 'both in relations with states which are not members of the Union and among Europeans themselves'.[37] This resulted to the eventual endowment of the Union with legal personality in the new Constitutional Treaty (Article I-7).

Ultimately, what seems to lurk behind the 'constitutional transformation' debate is not so much about whether the EU legal order is independent from the international or national legal orders, but rather the other way round; the extent to which the national legal orders can be independent from the Union. And the reluctance to settle the debate is the reluctance to surrender to the transfer of

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[35] A.Verhoeven, op.cit. n.31, p.71.

[36] While the European Community (EC) constitutes a legal order that is self-sufficient in relation to the legal orders of the Member States, the EU falls short of the EC in the aspects of autonomy, direct applicability and primacy of EC law. However, there is no express statement in the Treaties to the effect that the EU is an independent legal order. However, the perception of the Union as a distinct entity could be supported by Article 6(3) TEU: 'it shall respect the national identities of its Member States'. K.Lenaerts and D.Gerard, op.cit n.7, p.308.

[37] CONV 305/02, Final report of Working Group III on Legal Personality, 01.10.2002. The WG argued that a legal personality for the Union is justified for reasons of legal certainty, transparency and the building of a higher profile for the Union 'not only in relation to third states, but also vis-à-vis European citizens'. While increasing the input and output legitimacy, it brings the EU in conformity with a constitutional regime able to exercise rights and undertake obligations with regard to its own constituents 'in conformity with its own constitutional arrangements'.

sovereign powers at supranational level, beyond the Member States and their citizens''permissive consensus'. The fact that the EU may have become a constitutional order does not necessarily settle the supremacy debate in its favour. The 'constitutional' features of this 'new' legal order described above provide no conclusive answer as to the distribution of powers between component parts of the constitutional order.

2.3 The Union's legitimacy based on the 'rule of law' principle

A consequence of the processes of European integration and constitutionalisation is a polity with a legal order that consists of institutions with rule-making discretion in certain, nonetheless, ever-expanding policy areas, as well as procedures for determining and penalising infringements. Seemingly, there is no higher law-making power which the EU is subject to, and whose authority can validate and guarantee its own rules of power. In the event, the very essence of the Union's sovereignty is the fact that it is self-validating, in a legal sense, representing at once 'a condition of power and of vulnerability'. Of power, because the EU is, arguably, independent of any higher authority in the legal control over its own policy domains. Of vulnerability, because there is no superior legal authority to which it can appeal to confirm its own legitimacy and to enforce its own rules in face of internal resistance either from national judiciaries or the citizens of the Member States.[38] What then determines the political and legal boundaries of the order?

Undoubtedly, the statement that there is no higher authority should be qualified since the EU was founded under international law regarding the establishment and observance of the treaties; it is an international organisation set up pursuant

[38] D. Beetham, *The Legitimation of Power*, Macmillan, 1991, pp.121-122.

to the 1969 Vienna Convention on the Law of the Treaties.[39] Therefore, the Union is an entity of international law and its institutions, as international institutions, have secured indirect legitimacy through the approval of the legitimate government of the Member States. Then, again, the upshot of the Union's transformation argument, established by the Court as examined in the previous section, is that the European treaties no longer depend for their validation on international law.

Going back to the original argument, if there is no higher rule-making authority, what makes the Union's legislative authority rightful or legitimate? The Union, its objectives and policies are said to be founded on the 'rule of law'.[40] But what is the 'rule of law' and how is it relevant to the legitimacy debate? This is an essentially contested concept,[41] very much embedded in perceptions of different legal systems and different moments in history. It relates to the mechanics of the system rather than the content of the rules it produces and forms part of the constitutional traditions of the Member States. Since the Union is said to be an independent legal order, national interpretations of the principle may not be automatically transplanted into EU law.[42] It could be possible to offer a minimum definition of the concept as the belief that those who exercise influence over the creation of law are themselves subject to it and have to conform to

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[39] Articles 26 and 27 of the VCLT 1969. However the Court of Justice has said that the Vienna Convention has no binding force in the Community and that the use of the international legal framework to challenge the validity of a Community act was unwarranted: Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I –3655, paras.59-60, 67, 71, 73-4, 89-90, 39 and 41 of the judgment.

[40] Article 177(2) TEC, Preamble, Articles 11 (1) and 6 (1) TEU. In the TeCE, the Preamble, Articles I-2 and III-292(1).

[41] J.Goldsworthy, 'Legislative Sovereignty and the Rule of Law', in *Sceptical Essays on Human Rights*, T.Campbell, K.D.Ewing and A.Tomkins (eds), OUP, 2001. N.W.Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?', (2004) 17 Ratio Juris 474-488, p.474. For an analysis on legalistic and non-legalistic, formal and substantive conceptions of the 'rule of law', see: T.R.S.Allan *Constitutional Justice*, OUP, 2001; A.Marmor, 'The Rule of Law and its Limits', (2004) 23 Law and Philosophy 1-43; P.Craig, 'Constitutional foundations, the rule of law and supremacy', (2003) PL 92-111; P.Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework', (1997) PL 467-487; M.Neumann, *The Rule of Law*. Ashgate, 2002. To Yasuo Hasebe, the 'rule of law', a controversial concept, is the ideal state of a legal system under which people are able to lead their lives with sufficient knowledge of when and how their government can exercise its coercive powers: Y.Hasebe, 'The Rule of Law and Its Predicament', (2004) 17 Ratio Juris 489-500, p.489.

[42] The English *Rule of Law*, the French *Regne de la Loi* and the German *Rechtsstaat* are said to represent the three main European traditions regarding the 'rule of law' principle. Generally speaking, these concepts refer to a set of conditions underpinning democracy, including separation of powers, principles of legality and adjudication, formal equality and constitutional rights: M.L.Fernandez-Esteban, op.cit. n.20, Part II, Chapter 3.

procedures, if they wish to change it. The powers of the institutions to legislate need to have a normative force in defining duties, obligations and in conferring rights and entitlements. Legislative power can be legitimate to the extent that its acquisition and exercise conform to established law and is limited by it.[43] So, a substantive condition of legitimacy is legality.[44]

As Michael Newman rightly observes, a broad and politically charged concept like the 'rule of law' is not defined for the sake of lexicographic or semantic purposes, but according to an agenda, to the morality it wants to purport.[45] The 'agenda' of the present work is to explore the limits of the EU legal order, as law is unequivocally central to the development of the EU. The traditional legal reading of EU legitimacy identifies legitimacy in terms of 'legal validity'; the EU is based on a set of fixed and identifiable rules and principles and judicial remedies are available to ensure respect for such rules and principles.[46] According to Robert Summers' article, 'A Formal Theory of the Rule of Law',[47] '*The ideal of the rule of law consists of the authorised governance of at least basic social relations between citizens and between citizens and their government as far as feasible through published formal rules congruently interpreted and applied with the officialdom itself subject to rules defining the manner and limits of their activity, and with sanctions or other redress against citizens and officials for departures from rules being imposed only by impartial and independent courts*'. The institutional system of law-makers, legal process and adjudication is the institutional embodiment of the ideal of the rule of law.

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[43] D. Beetham, op. cit. n.38, pp.56, 64 and 68.
[44] Legitimacy has a formal, normative dimension that refers to legality, that is, the requirement that all authority springs through a chain of formal validity rules intended to promote legal legitimacy. A.Verhoeven, op.cit. n.31, p.11. R.H.Fallon, 'The Rule of Law as a Concept in Constitutional Discourse, (1997) 97 Columbia Law Review 1-56, p.14. L.Senden, *Soft Law in European Community Law*, Hart Publishing, 2004, p.64.
[45] M.Neumann, op.cit. n.41, p.23.
[46] J.P.McCormick, 'Supranational Challenges to the Rule: The Case of EU', in *Recrafting the Rule of Law: The Limits of Legal Order*, D.Dyzenhaus (ed), Hart Publishing, 1999, p.271. S.Smismans, *Law, Legitimacy and European Governance-Functional Participation in Social Regulation*, OUP, 2004, pp.56-7. S.Smismans, 'The Constitutional Labelling of "The democratic life of the EU"', in *Political Theory and the European Constitution*, L.Dobson and A.Follesdal (eds), Routledge, 2004, p.123.
[47] R.Summers, 'A Formal Theory of the Rule of Law', (1993) 6 Ratio Juris 127-142, pp.129-130.

The oldest and the most prominent attempt to justify the European enterprise in pursuance of the legitimacy theory is the concept of 'a Community governed by law' developed by Walter Hallstein. The omission of any reference to the 'rule of law', which was not mentioned in the original European Community Treaties, was not rectified until Maastricht when the term appeared in the Preamble to the new TEU and, since then, has come to occupy an important place in the values underlying the Union.[48] The TEU was amended to restrict the right to apply for membership of the Union to European states which respect these values (Article 49 TEU). Moreover, a serious and persistent breach of a 'rule of law' by a Member State might henceforward lead to suspension of rights.[49] Although references to the principle only started to appear recently, it has always been implicit in the legal system of the Union. The EU is not merely a creation of law, validly constituted by sovereign states according to international treaties, it is an entity founded on law that pursues its objectives purely by means of the law. It has no other means of enforcing its authority; its weapon is the law it creates. It was, therefore, envisaged from the outset that the institutional structure of the Community would include a Court of Justice with the express duty to ensure observance of the law. Each of the three original treaties equipped the Court with far-reaching powers to enable it to discharge that duty.[50] Decision-making in the Union is governed by rules laid down in advance and, in the case of the EC, enforced by an independent judiciary. The treaties are the basis of the institutional system; they lay down the procedures for decision-making and regulate the relationship between the institutions. Each institution is to act within the limits of the powers conferred on it. Like any legal order, that of the Union affords a self-contained system of legal protection for the purpose of recourse to and enforcement of Community law.

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[48] D.Obradovic, op.cit. n.10, p.196. A.Arnull, 'The Rule of Law in the EU', in *Accountability and Legitimacy in the EU*, A.Arnull and D.Wincott (eds), OUP, 2002, p.238. See, for instance, the duty to promote democracy and the rule of law in CFSP (Article 11(1) TEU) and development cooperation (Article 177(2) TEC).

[49] Article 7 TEU.

[50] M.L.Fernandez-Esteban, op.cit. n.20, p.175. D.Obradovic, op.cit. n.10, p.197. A.Arnull, op.cit. n.48, p.241.

2.3.1 Democracy: a pillar of legitimacy?

In the previous section, an attempt was made to define the 'rule of law' principle, concluding that it is not clear what sort of construct it really is. However, one can determine what it is not. It is not a form of government. On the other hand, democracy is. Before exploring how democratic the Union is as a regime, the democratic yardstick needs to be explained.[51] Democracy is a system of government in which power is based on the will of the people, on the people's ability to rule in the sense that they are able to control those who make decisions on their behalf. The law, being a human creation, must necessarily be subject to human will. Democracy requires that people who live under laws have a substantial voice in the generation of rules under which they live.[52] The fundamental idea of *democratic legitimacy* is that political power should be based on law and ultimately be the power of the public, i.e. the power of free and equal citizens. This is a very abstract statement, but it points to the normative core of the democratic ideal: when we speak of democratic legitimacy, the idea is that citizens must be able to regard themselves not only as the addresses, but also the ultimate authors of the law. Then, people consent to be governed and obey rules to the extent that they can consider themselves in one way or another as makers of those rules.[53] Consent may be achieved by popular control of the political process pursuant to institutionalised rules which ensure that the governing and decision-making authority is *authorised* by the people, in a manner that is *representative* of and *accountable* to the latter.[54] The democratic legitimacy of the decision-making process presupposes that legislation is adopted

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[51] I.Sanchez-Cuenca, 'Power, Rules and Compliance', in *Democracy and the Rule of Law*, J.M.Maravall and A.Przewrski (eds), Cambridge University Press, 2003, p.67. A.Peters, 'European Democracy after the 2003 Convention', (2004) 41 CMLR 37-85, p.38.

[52] N.Neuwahl and S.Wheatly, 'The EU and Democracy – Lawful and Legitimate Intervention in the Domestic Affairs of the State', in *Accountability and Legitimacy in the EU*, op.cit. n.48, pp.222-3. I.Sanchez-Cuenca, op.cit. n.51, p.62. Ch.Lord, 'Democracy and democratization in the EU', in *Governing Europe*, S.Bromley (ed), Sage Publications, 2001, pp.166-7. H.S.Richardson, 'Administrative Policy-making: Rule of Law or Bureaucracy?', in *Recrafting the Rule of Law: The Limits of Legal Order*, op.cit. n.46, p.318. G.Ress, 'Democratic Decision-Making in the European Union and the Role of the European Parliament', in *Institutional Dynamics of European Integration*, D.Curtin and T.Heukels (eds), Martinus Nijhoff Publishers, 1994, p.159.

[53] O.Gerstenberg, 'Denationalization and the Very Idea of Democratic Constitutionalism: The Case of the European Community', (2001) 14 Ratio Juris 298-325, pp.301-2. J.Tully, 'The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy', (2002) 65 MLR 204-228, p.205.

[54] Ch.Lord, *Democracy in the EU*, Sheffield Academic Press, 1998, pp.15-16.

through institutionalised procedures that facilitate citizen participation in decision-making. As such, legitimacy is a concept founded on the premise of the doctrine of popular sovereignty, that the people may be the only legitimate source of power since they represent the 'ultimate authority'.[55]

Why should democracy be regarded as a source of legitimacy for the EU? Quite rightly, Joseph Weiler observes that the extensive literature on Europe's democratic shortcomings just takes for granted that Europe should be a democracy.[56] 'In principle', writes Juergen Habermas, 'the rule of law can exist without the concomitant existence of democracy, that is, without the political rights empowering the citizens to bring influence to bear on changes of their own status'.[57] Indeed, there is no universal legal obligation to introduce democracy. There have been periods in history and society, where regimes enjoyed legitimacy in the absence of democracy, and it has also been possible for democratic structures to be illegitimate either *in toto* or in certain aspects of their operation.[58] A crucial aspect of the discussion on the legitimacy of the Union's legislative process is the recognition that there is more to legal norms than procedures. Legality alone is not adequate, because rules cannot justify themselves simply by being rules; they require justification by reference to considerations beyond themselves. Legitimacy cannot be guaranteed merely by rule conformity as no account is taken of the content of such rules and of the principles that underpin them. There has to be a deeper normative validating rule such as 'democracy', an ethic, as norms are not value free.[59] The 'rule of law'

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[55] L.Senden, op.cit. n.44, p.66. M.Jachtenfuchs, 'Democracy and Governance in the EU', EIOP WP97/02. The universality of the idea today is recognised in the UN Declaration of Human Rights that 'the will of people shall be the basis of the authority of the government' (Article 21). D.Obradovic, op.cit. n.10, p.195. O.Gerstenberg, op.cit. n.53, p.299.

[56] J.H.H.Weiler, 'Prologue: Amsterdam and the Quest for Constitutional Democracy', in *Legal Issues of the Amsterdam Treaty*, O'Keeffe and Twomey (eds), Hart Publishing, 1999, p.4-5.

[57] F.Mancini and J.H.H. Weiler, 'Europe- The Case for Statehood...and the Case Against. An Exchange', (1998) JMWP 6/98.

[58] Regimes enjoyed both formal and substantive legitimacy in the absence of democracy, where, for instance, the divine, and not the people, was the source of legitimacy (i.e. monarchy): Ch.Lord, op.cit. n.2, pp.7-8 and N.Neuwahl and S.Wheatly, op.cit. n.52, pp.222-3. Germany during the Weimar period was democratic but the government enjoyed little legitimacy. During National Socialism, Germany ceased to be democratic when Hitler rose to power, but the government enjoyed widespread legitimacy. J.H.H.Weiler, *The Constitution of Europe*, Cambridge University Press, 1999, pp.79-80 and D.Dyzenhaus, *Legality and Legitimacy*, OUP, 1999, pp.1-32.

[59] F.M.Barnard, *Democratic Legitimacy-Plural Values and Political Power*, McGill-Queens's University Press, 2001, pp.9, 27-8 and 40. J.Goldsworthy, op.cit. n.41, pp.64-5. D.Obradovic,

and democracy are inherently connected, perhaps because legality is thought of as intimately linked to legitimacy and legitimacy in turn depends on democracy.[60] To Habermas,[61] it is only democratic institutions that can sustain a culture of justification. To be in favour of democracy is to think that the way to decide on the terms of collective life is through citizens engaging in a process of justifying to each other what they hold to be right. And to institutionalise a process of mutual justification is to adopt democratic institutions.

Writing in the field of law, scholars like Thomas Franck have argued that there is an (emerging) right to democratic governance. Francis Fukuyama has proclaimed western liberal democracy as the final form of human government; although he did not mean that no other regimes will emerge, to him history had come to an end, meaning that mankind had achieved in liberal democracy, on the closing decades of the twentieth century, a form of society that satisfies its deepest and most fundamental longings.[62] These developments recognise an increasing trend to see democracy as a truly universal value and as a condition for the acceptance of a regime by the world community. This is also the case in Europe, where both states and international organisations have made it clear that democracy is the only legitimate form of government.[63] Legal instruments, national and international, enshrine rights that are designed to ensure political participation. Article 21 of the UN Declaration of Human Rights is an example.

It seems that, at least in the western world, democracy is considered the sole legitimate form of government to the extent that any other system would be

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op.cit. n.10, pp.197-8. J.H.H.Weiler, 'Legitimacy and Democracy of Union Governance', in *The Politics of European Treaty Reform-The 1996 IGC and Beyond*, G.Edwards and Al.Pijpers (eds), Pinter, 1997, pp. 249-250.

[60] Richardson refers to *legitimate legality* as he agrees that that the legitimacy of laws does depend on democracy. However, the relation between 'rule of law' and democracy is quite open. A narrower traditional interpretation of the 'rule of law', he says, may be summed up under three headings: rules must be general, they must provide a predictable basis for citizen action and they must be generated via a regular and fair process. H.S.Richardson, op.cit. n.52, pp.309 and 315.

[61] D.Dyzenhaus, op.cit. n.58, p.244.

[62] Fr.Fukuyama, *The End of History and the Last Man*, Penguin, 1992. A.Verhoeven, op.cit. n.31, pp.7-8. Ch.Lord and D.Beetham, 'Legitimizing the EU: Is there a "Post-Parliamentary Basis" for its Legitimation?', (2001) 39 JCMS 443-462, p.447. D.Held, 'Democracy: From City-states to a Cosmopolitan Order?', in *Contemporary Political Philosophy. An Anthology*, R.E.Goodin and Ph.Pettit (eds), Blackwell Publishers, 1997, p.83.

[63] S.Wheatley, 'Democracy in international law: a European Perspective', (2002) 51 ICLQ 225-248, pp.234-5.

unacceptable and politically illegitimate. A democratic regime has both a social aspect in terms of being rooted in popular consent and a normative aspect in terms of advocating values like liberty and equality on which consent is based. Hence, to some commentators the notions of legitimacy and democratic legitimacy are interchangeable, while 'formal' legitimacy is not defined solely as legality, but as democratic legitimacy. This notion of formal legitimacy is distinct from that of simple 'legality' and is founded on democratic institutions and processes created by law.[64] Therefore, in today's Europe, as in the West generally, any notion of legitimacy must rest on some democratic foundation, loosely stated as the people's consent to power structures and processes. In the individual Member States, the substance and procedures of legislative processes have been democratically structured and legitimated. The Union is no longer an organisation that pursues purely economic objectives with institutional mechanisms that can disregard the requirement of democracy. Thus, its structure, powers and activities require both legality and democracy as constitutive parts of its legitimacy.[65] In the EU, any perception of 'democracy' will have to take into account its relationship with the Member States, although one could not overlook the peculiarities of the polity.

With the 'Europeanisation' of decision-making, the Union's decisional boundaries have been fundamentally redefined by successive intergovernmental reforms and informal adjustments, normally judicial, whilst the formal political boundaries of the Member States remain intact. The EU has emerged as a polity, as a system of governance in its own right, a regime of multilevel governance in which authority and policy-making are shared across multiple levels of government (subnational, national, supranational). As decision-making is shared across these levels and as the political culture at the national and subnational levels is that of (liberal) democracy, then what alternative political options are left to the EU? The constitutions of the Member States are all based on democratic principles, notwithstanding the fact that there are various conceptions

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[64] J.H.H.Weiler, 'Why Should Europe be a Democracy? The Corruption of Political Culture and the Principle of Constitutional Tolerance', in *The Europeanisation of Law: The Legal Effects of European Integration*, F.Snyder (ed), Hart Publishing, 2000, p.213. G.deBurca, op.cit. n.3. K.Lenaerts and M.Desomer, op.cit. n.9, p.1220. J.H.H.Weiler, 'The Transformation of Europe', (1991) 100 YLJ 2405-2478, pp.2468-9. A.Verhoeven, op.cit. n.31, p.8.
[65] J.H.H.Weiler, op.cit. n.56.

of democracy due to the different traditions and history of those states. If the Union in its development has moved away from a strictly international organisation towards a polity of democratic states, then, democracy - a constitutional principle in every Member State - has to be regarded as a general principle of EU governance. Democracy might have been irrelevant, if EU policy-making had not interfered with the political culture, political and legal organisation within the Member States, but this polity-creating process has long passed some threshold in the accumulation of power and the direct influence over ordinary lives.

Does the non-stateness of the EU's political system mean that the Union does not need to meet the same broad criteria of legitimacy as liberal democratic states or that it can be legitimated by a lesser standard or even by different standards than a state? One rarely hears the argument that the EU does not need democratic legitimacy, although opinions as to how such legitimacy is to be understood and attained differ widely. Within the Member States there is a general expectation that the EU should meet similar standards to the state as to the kind of choices it makes on behalf of citizens and the extent to which it has final rule-making authority.[66] According to the German Federal Constitutional Court in the *Maastricht*[67] judgment, in examining questions relating to the democratic decision-making in the EU, the relationship between democracy in the Member States and democracy within the EU is crucial for the further development of European integration. An indication of the significance of democratic rule in Union governance is provided by survey evidence, which suggests that there is popular expectation that the EU should be subject to key attributes of democratic rule found in national orders, namely, public scrutiny of institutions and definition of their powers, public control and participation in decision-making.[68] According to a recent EU poll,[69] while the majority of citizens are satisfied with the way democracy works in their country, it is widely felt that the voice of citizens is not heard in the EU and there is less satisfaction with how the system

[66] Ch.Lord and D.Beetham, op.cit. n.62, pp.443-7.
[67] *Brunner v European Union Treaty* [1994] 1 CMLR 57.
[68] *Five Democratic Tests for Europe*, Charter88, 2003.
[69] Eurobarometer 63, *Public Opinion in the European Union*, European Commission, Spring 2005.

works in democratic terms. Although the results may differ from Member State to Member State, they still are testimony of the fact that citizens expect the EU somehow to emulate national political systems.

From its inception, the Union was not envisaged by its founders to be a democratic organisation. This is not surprising, since it began its life as an international organisation founded on a treaty between sovereign states and, as such, it derived indirect legitimacy from the democratically elected governments of the Member States. Hence, there was no need for direct democracy in its system of decision-making. The Court's jurisprudence on the special nature of the Community legal order came years later and did not represent either the intention of the founding fathers or the position of the Member States and their citizens. Since Maastricht, democracy is one of the principles upon which the Union is founded and its membership is reserved only for democratic states[70] and, although until the TeCE[71] democracy was not part of the overarching guiding principles that affect policy-making, it has always been a fundamental factor in policy formulation.[72] Decision-making within the Union is often judged in terms of the extent to which it is based on democratic principles and there is consensus among the EU institutions that democracies need the participation of all their citizens in the institution of representative democracy, if democracy is to function properly.[73] The intention to accommodate and consolidate democratic structures, as they exist in the Member States, is further manifested in the proposals for institutional reform.[74] The importance of democracy in the EU is best reflected in the requirement of internal democratic rule as a condition for Union membership. So, democracy does matter in Europe to a degree that the

[70] For instance, Articles 6, 7 and 49 TEU. In contrast, under Article 237 EC, Community membership was reserved to *any* state, democratic or not.
[71] Article I-2, Title VI on 'the democratic life of the Union' TeCE. An analysis will be provided in chapter 7.
[72] The EU treaties go a step further expressly stipulating that the CFSP and external cooperation should aim at developing and consolidating democracy, the 'rule of law' and respect for human rights (Article 177(2) TEC and Article 11(1) TEU), principles that define the economic and political relationship of the EU and its Member States with third countries. Under Article 7 TEU Member State rights may be suspended in the event of serious and persistent breaching of the principle of democracy.
[73] Resolution of the Council and of the Representatives of the Governments of the Member States of 24 May 2005 meeting within the Council on implementing the common objective: to increase participation by young people in the system of representative democracy, [2005] OJC 141/02, 10.06.2005.
[74] A. Verhoeven, op.cit. n.31, p.6.

Union exposes itself to the democratic yardstick by equating legitimacy with democratic governance.

2.3.2 Democratic deficit as a crisis of legitimacy

When assessing democracy in the EU, emphasis should be placed both on individual institutions and the overall decision-making process. One needs to establish how the Union performs against the defining features of democratic rule, that is, public control and political equality, but also the key principles by which the democratic rule is realised like accountability, openness, representation and responsiveness, (electoral) authorisation, rights protection, which seek to provide a scale, an 'index' of democracy by which to audit the quality of democracy.[75] For instance, authorisation especially through appointment of decision-makers into public office provides a publicly expressed consent for their subsequent policies. Representation and responsiveness entails the aligning of public policy with preferences of the public itself; decision-makers should be representative of the governed at least in the sense of being institutionally constrained to consider the needs and values of the public.[76] Accountability in the form of political responsibility ensures that the terms on which political power is authorised are duly observed.[77] It is also important to the democratic content of decision-making that information is available about policy and that policy should be open and transparent, since this is likely to increase public support in the exercise of power. Democracy issues raise intricate questions not only about the exercise of legislative power, but also about the

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[75] J.Morison, 'Models of Democracy: From Representation to Participation?', in *The Changing Constitution*, J.Jowell and D.Oliver (eds), OUP, 2004, pp.144 and 150. Ch.Lord, *A Democratic Audit of the European Union*, op.cit. n.2, pp.7-8. J.H.H.Weiler, 'The Transformation of Europe', op.cit. n.64, p.2470. K.Lenaerts, P.van Nuffel and R.Bray (ed), *Constitutional Law of the EU*, Sweet and Maxwell, 2005, pp.652-653. D.Beetham and Ch.Lord, *Legitimacy and the EU*, Longman, 1998, p.6. Ch.Lord, 'Democracy and democratization in the EU', op.cit. n.52, p.167.

[76] Ch.Lord, 'Democracy and democratization in the EU', ibid. Ch.Lord, *Democracy in the EU*, op.cit. n.54, pp.17, 44 and 80.

[77] Ch.Lord, *Democracy in the EU*, ibid, pp.16, 45 and 80.

protection afforded as to the effects of legislative outcomes, pursuant to the 'rule of law' principle.

The 'new', historically unprecedented, *sui generis* political entity, the EU, which transgresses the classic dualism of states and international organisations has brought with it disquiet over the 'democratic deficit' of the emerging system of shared political (and legal) authority. On the one hand, this system remains based on international treaties with its roots still traced in the national orders of the Member States. On the other hand, the Treaty on European Union created a new entity with a much broader substantive ambit. The substantial accretion of authority to supranational institutions beyond the control of the Member States represented a quantum leap with which many ordinary people were uncomfortable,[78] as the increased independence of EU decision-making from national parliamentary control has entailed the transfer of normative authority to actors that are not directly accountable to an electorate.[79] The problem is not merely the establishment of an additional layer of policy making, which is distant from the people, but the very transformation of the Member States, which may no longer claim to be the sole source of their own legitimacy. The borders of the democratic (Member) State no longer embrace the whole spectrum of individual activity and it is becoming increasingly difficult to relate the polities in which one participates and the polities that affect us.[80] In essence, the shift of power from national to EU level was not followed by an EU-bound popular consent which in turn created a 'disconnection', a 'disconnection between institutions and voters', in other words, a 'democratic deficit'.[81] Accordingly, since the ratification of the Maastricht Treaty in 1992, citizen commitment to the European project has been far from unequivocal.

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[78] O.Gerstenberg, op.cit. n.53, pp.300-1. A.Arnull, op.cit. n.48, p.7.
[79] P.Lindseth, op.cit. n.21, p.633.
[80] E.Eriksen and J.Fossum, 'Democracy through *strong republics* in the EU?', ARENA WP 01/16. M.P.Maduro, 'Europe and the Constitution: What if this is As Good As It Gets?', CONWEB 5/2000.
[81] N.Clegg MEP, 'Restoring Legitimacy: Parliaments and the EU', in *European Governance. Views from the UK on Democracy, Participation and Policy-making in the EU*, U.Rueb (ed), The Federal Trust, 2002, p.31. A.Muntean, 'The European Parliament's Political Legitimacy and the Commission's "Misleading Management": Towards a "Parliamentarian" European Union?', EIoP 4/2000.

The degree of public unease became clear during the exceptionally difficult ratification process which the Treaty underwent,[82] and it was the subject of legal challenge in the national courts of the United Kingdom,[83] Germany[84] and Denmark,[85] that arose out of constitutional complaints against ratifying Maastricht, by individuals reacting to the transfer of sovereignty and its impact on issues like representation and authorisation (voting) at national level. Both instances manifest widespread public misgivings about the nature of the Union and an unwillingness to entrust the continued governance of Europe to distant, bureaucratic elites. This brought democratic deficit into the public domain and generated widespread academic and political debate, especially with regard to the classical thesis of the limited influence of the European Parliament in the EU decision-making.[86] The thrust of the debate is not that the EU is undemocratic, but that it is not sufficiently democratic as, due to its complex working structure and the manner in which power is distributed horizontally and vertically across the levels of governance and across particular institutions, the EU is far-removed from its citizens.

Although it has no fixed meaning, the idea behind the notion of 'democratic deficit' is that decisions in the EU are in some ways insufficiently representative of and accountable to the people.[87] Once the debate had moved away from the main preoccupation with the role of the EP, a number of other issues became relevant. So, what are the perceived shortcomings of the Union's institutional structure? First and foremost, the distance between the place where decisions are taken and the place where decisions affect us. In a multilevel decision-making structure, it becomes increasingly difficult to track, contest or influence particular decisions. The transnationalisation of political (and legal) authority brings into decision-making actors external to national political contexts who are said to affect (and are affected by) national decisions and overall diminish the

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[82] It was rejected by the Danish in a referendum less than six months after it was signed and later secured only a narrow majority in a referendum held in France. The Danish people were persuaded to vote in favour of the Treaty in a second referendum in May 1993.
[83] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Lord Rees-Mogg* [1993] 3 CMLR 101.
[84] *Brunner*, op.cit. n.67.
[85] *Carlsen and Others v Prime Minister Rasmussen* [1999] 3 CMLR 854.
[86] A.Verhoeven, op.cit. n.31, p.69.
[87] Ch. Lord, 'Democracy and democratization in the EU', op.cit. n.52, p.165.

meaningful and equal opportunity of individuals to influence policy outcomes within their national orders.[88] Another complaint is the bypassing of democratic channels as decisions take place outside the formal institutional framework or through the operation of complex procedures established pursuant to the delegation of power to the Commission. In this context, technocrats and national interest groups dominate the sphere of decision-making to the exclusion of more regular channels of democratic decision-making such as the EP, the Council and national parliaments. Then, there are issues of transparency as much of decision-making takes place behind closed doors, while the plethora of procedures and their inherent complexity are further exacerbated by the different voting rules in the Council[89] Last but not least, the absence of a European 'demos' means that democratic deficit is structurally determined. [90]

While it is largely the view that the EU suffers from 'democratic deficit', others argue that such deficit is conjured. Philippe Schmitter challenges the veracity of the claim due to the general tendency among academics and actors to presume an isomorphism between the EU and national polities. This attitude implies that the only way to fill that deficit is to insert 'conventional democratic institutions' into

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[88] N.Walker, 'Europe's Constitutional engagement', (2005) 18 Ratio Juris 387-399, pp.391-2.
[89] P.Craig, op.cit. n.9, p.23.
[90] According to a school of thought, constitutional consensus can never be achieved because Europe lacks a *demos*, a European 'constituent subject', a people that is the basis of the polity. Traditional state-oriented constitutional theory considers, in a nutshell, that the legitimacy of a constitutional text requires a pre-existing sovereign (state) entity based on a pre-existing social substrate and, thus, it is improper to give the TeCE 'the appellation of a constitution'. The objection to the claim that the treaties have matured into a European Constitution is summarised by J.Habermas; so long as there is not a European people sufficiently 'homogeneous' to form a democratic will, there should not be a constitution. This view does not deny that treaties, coupled with the Court's jurisprudence, meet many of the criteria of modern constitutionalism. What is inherent in a constitution is the people's capacity to attribute power to themselves, and a constitution is an act taken by or at least attributed to people. The absence of a collective European identity means that there is no justification for grounding any European Constitution in the people. Without the will of a European *demos* there can be no democracy and without democracy a legal and political order lacks the necessary underpinnings that justify its constitutional nature; only a *demos* can 'constitute' or 'create' a constitutional order. J.Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"', (1995) 1ELJ 303, p.304. D.Grimm, 'Does Europe Need a Constitution?', (1995) 1 ELJ 282, pp.290-1 and 298-9. For a detailed analysis on the 'no-demos' thesis, see :J.H.H.Weiler, 'Legitimacy and Democracy of Union Governance', in *The Politics of European Treaty Reform*, G.Edwards and A.Pijpers (eds), Pinter, 1997. P.Craig, op.cit. n.9, p.28. D.Beetham and Ch.Lord, op.cit. n.75, pp.6 and 8. P.Craig, 'Constitutions, Constitutionalism, and the EU', (2001) 7 ELJ 125-150, p.137. J.H.H.Weiler, 'The State "Ueber alles" Demos, Telos and the German *Maastricht* Decision', JMWP 6/96. The *no-demos* thesis is beyond the remit of the current work, as it is pertinent to the issue of 'polity' legitimacy.

the way the EU makes binding decisions.[91] His central contention along with Andrew Moravcsik and Yves Meny is that, if one adopts reasonable criteria for judging democratic governance, the widespread criticism is unsupported by the existing empirical evidence. In reality, they say, the EU is a sophisticated institutional system of checks and balances based on the carefully balanced triangle of the Commission, the Council and the Parliament underpinned by the ECJ and there are other procedural constraints, like the indirect democratic control via national governments to ensure that the EU is politically responsive to the demands of EU citizens.[92] What the commentators argue is that the constitutional or procedural features of democracy are met, but what about the popular or participatory aspects of democracy?

Surely, it is difficult to apply state-centred notions of democracy to the EU due to its special nature. Besides, the democratic performance of the EU varies across institutions and levels of Union governance but the opportunities for democratic control depend crucially on how the Member States interact within the European arena. For instance, it is up to the Member States to decide the procedure for treaty ratification, how scrutiny and powers are exercised by national parliaments as well as the conduct of national representatives in the Council. Still, the question is not whether Member States can control EU institutions but whether citizens can control the EU institutions as well as their national governments who combine to exercise EU powers. As Christopher Lord rightly observes,[93] it is harder to give an answer to this question because of the poor citizen understanding of the EU system due to 'transparency blindspots' in the workings of Union institutions and legislative process, the uneven development of the power of the national parliaments on EU issues and voter alignment in EP elections. If the popular and participatory ingredients of democracy are underdeveloped, he continues, should we be reassured by the claim that the EU is constitutionally a sophisticated system of checks and balances? Popular and constitutional elements of democracy are interdependent to the point at which it

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[91] Ph.C.Schmitter, 'What is there to Legitimize in the EU...and how Might this be Accomplished?', JM WP14/01.
[92] A.Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the EU', (2002) 40 JCMS 603-624, p.604. Y.Meny, '*De la democratie en Europe*: Old Concepts and New Challenges', (2002) 41 JCMS 1-13, p.6.
[93] Ch.Lord, op.cit. n.2, pp.223-5.

is questionable whether it is meaningful to speak of one being present without the other. Checks and balances on their own only deliver controlled government not *publicly* controlled government.

2.3.3 Institutional balance and democratic legitimacy in the changing constitutional arrangements

The pre-Maastricht comment of Bogdanor and Woodstock that the shortcomings of the Community lie in the feelings of remoteness and lack of influence and involvement on the part of many of its citizens still seems to hold true.[94] The debate on the lack of democratic input narrows down to the institutional setting of the Union, so the linchpin of this approach is to define democracy as an 'institutional arrangement', where the focus is on government structures and their interrelationship. This is an idea of democracy based on the way powers are allocated to allow for the participation of democratic institutions that 'strive to motivate law-making in the public interest and render it accountable to citizens'[95] and on a decision-making process that subscribes to popular involvement and scrutiny.

In this context, the notion of 'institutional balance' is firmly linked to the constitutional language of the Union. It is both a legal (as developed by the Community courts) and a political principle and, although its content and function are far from clear, its historical and intellectual roots are to be found in the doctrine of 'separation of powers', commonly attributed to Montesquieu.[96]

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[94] V.Bogdanor and G.Woodstock, 'The European Community and Sovereignty', (1991) 44 Parliamentary Affairs, cited in K.Featherstone, 'Jean Monnet and the "Democratic Deficit" in the EU', (1994) 32 JCMS 149-170, p.149.

[95] P.Craig, op.cit. n.9, pp.37-8.

[96] K.Lenaerts and A.Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance' and S.Smismans, 'Institutional Balance as Interest Representation. Some Reflections on Lenaerts and Verhoeven', in *Good Governance in Europe's Integrated Market*, C.Joerges and R.Dehousse (eds), OUP, 2002, pp.35-6 and pp.91-2 respectively. H.Wallace,

'Separation of powers' relates to the apportionment of competences between the legislative, executive and judicial branches of authority. Properly (and thus not strictly) understood, it purports to install a system of 'checks and balances' according to which no power should be able to fulfil its tasks without being controlled by another power.[97] Hence, as a principle of democracy, it seeks to protect people against abuses in the exercise of power and in this way it preserves the democratic character of a legal order.

The *sui generis* nature of the EU makes difficult the automatic translation of the principle of separation of powers into a central organiser of the role of the institutions. The institutional architecture of the EU is such that it has not an identifiable legislature but a legislative process in which different political institutions have different parts to play. In the absence of a clear separation of powers the concept of institutional balance has acted as a substitute with the aim to highlight the interrelations between the institutions and to establish a basic protective and guarantee mechanism over the exercise of functions between them.[98] Yet, this is not to say that the principle of separation of powers is irrelevant in the case of the Union. The EC Treaty recognises a *division of functions*, rather than powers strictly speaking, among the institutions in Title X (ex VIIa) EC. In this functional sense, it is a structural feature underlying the EU legal order.[99] For instance, the Court of Justice, in the *IBM* case,[100] referred to a 'system' rather than a 'principle' of division of powers between itself and the

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'Designing Institutions for an Enlarged EU', in *Ten Reflections on the Constitutional Treaty for Europe*, B.deWitte (ed), CONV703/03, p.90.

[97] W.Van Gerven, 'Towards a Coherent Constitutional System within the EU', (1996) 2 EPL 81-101, p.90. The *proper* understanding of the notion of separation of powers as a system of checks and balances is supported also by Laurence Claus. He explains that although Montesquieu rightly saw that liberty from the arbitrary exercise of power would be served by apportioning power among multiple actors, he erred in thinking that apportionment could be sustainable only if along essential lines. Montesquieu failed to see that involving multiple actors in every exercise of power is the true protection against arbitrariness. Checks and balances, not essentialist separation of activities, prevent actors from conclusively determining the reach of their own powers: L.Claus, 'Montesquieu's Mistakes and the True Meaning of Separation', (2005) 25 OJLS 419-451, p.420.

[98] C.Closa, 'Constitution and Democracy in the Treaty Establishing a Constitution for Europe', (2005) 11 EPL 145-164, p.150.

[99] M.L.Fernandez-Esteban, op. cit. n.20, p.157.

[100] Case 60/81 *International Business Machines Corporation v. Commission of the European Communities* [1981] ECR 2639, para.20.

Commission, after considering the entirety of the rules that define their respective competences.

The phrase 'institutional balance' does not appear in the treaties but has become an accepted term for describing the complex allocation of functions amongst the various organs.[101] It was rather developed by the ECJ to inhibit the EU institutions from encroaching on each other's prerogatives.[102] Together with the principles of the autonomy of the institutions and loyal cooperation between them, it defines the institutional setting of the Union by delimiting the constitutional position of the different institutions to ensure the respect of the prerogatives of each institution.[103] In the Court's case law, institutional balance is an expression of the 'rule of law' principle,[104] which requires the exercise of power to reach a stage of equilibrium among the institutions, so as to avoid concentration of unlimited power in a single authority. Broadly the phrase is intended to convey the impression that there is a reassuring symmetry among the respective powers and roles of the main institutions (the European Parliament, the Council and the Commission). The principle of institutional balance does not imply that the authors of the treaties set up a balanced distribution of functions, whereby the weight of each institution is the same as that of others.[105] It rather refers to the treaty-based distribution of powers between the various institutions - which varies according to policy domains and specified procedural rules - that

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[101] The Protocol on the application of the principles of subsidiarity and proportionality, added by the Treaty of Amsterdam now mentions institutional balance without defining it: 'The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the meaning in full of the *acquis communautaire* and the institutional balance...' (paragraph 2 of the Protocol).

[102] Institutional balance is 'a system for distributing powers among the different community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishments of the tasks entrusted to the community'. Leading case: Case C-70/88 *EP v Council* [1990] ECRI-2041. C.Harlow, *Accountability in the EU*, OUP, 2002, p. 26.

[103] M.L.Fernandez-Esteban, op.cit. n.20, p.157. K.Lenaerts, 'Some Reflections on the Separation of Powers in the European Community', (1991) 28 CMLR 11-35, p.15. Case C-138/79 *Roquette v Council* [1980] ECR 3333. Case C-70/88, ibid. Case C-300/89 *Commission v Council* [1991] ECR I-2867. Case C-271/94 *European Parliament v Council* [1996] ECR 3-1689. Case C-408/95 *Eurotunnel & Ors v Sea France* [1997] ECR 6315.

[104] Formulated already in 1958 in the *Meroni* case the concept was clearly defined in Chernobyl: 'The treaties set up a system for the distribution of powers among the different EC institutions, assigning to each its own role. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of other institutions': S.Smismans, op.cit. n.46, pp.123-4.

[105] J.P.Jacque, 'The Principle of Institutional Balance', (2004) 41 CMLR 383-391, pp.383-4.

underlies the Union's institutional structure and which the institution shall have to respect (Article 7(1) TEC).

In the Union context, institutional balance is not a static concept, but it evolves over time as the Union's founding treaties are adapted. In the early academic literature, it was associated with the lack of adequate EP participation in the legislative process. A 'balance' in practice rested on a kind of trialogue with the Council and the Commission, in which the EP originally enjoyed a weak institutional role but gradually gained considerable ground.[106] This constituted the classic democratic deficit thesis. Such traditional reading of the principle does not correspond to the complex reality of EU governance, its three-pillar structure and the gradual proliferation of formal and informal actors, all forms of functional participation and representation that are part of the institutional reality.[107] Although the treaties have been amended, as well as construed by the ECJ, to incorporate most of the changes in substantive policy areas, they do not reflect the degree of institutional change that has actually taken place, other than in relation to the five 'cardinal' institutions.[108] Since each institution in theory at least represents a different constituency, the notion of institutional balance can be presented as a way of ensuring adequate participation and representation of difference constituencies within the EC process,[109] thus reflecting the institutional evolution of the EU not always evident in formal constitutional change.

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[106] The Toussaint report argued in a 1988 resolution that the democratic deficit stems essentially from a combination of two phenomena: the transfer of powers from Member States to Community level and the exercise of these powers by Community institutions other than the EP, even though before the transfer national parliaments held powers to pass laws: Resolution of the EP on the Democratic Deficit of the EC of 17.06.1988, [1988] OJ C187/229. H.Wallace, op.cit. n.96.

[107] S.Smismans, op.cit. n.96.

[108] G.deBurca, 'The Institutional Development of the EU: A Constitutional Analysis', in *Evolution of EU Law*, op.cit. n.9, p.56.

[109] A new reading of the institutional principle in terms of 'fair interest representation' has equally been developed by Craig and de Burca and has been suggested by Joerges and Nyer. Thus, institutional balance is regarded above all as a political principle, used as a normative tool to shape the institutional framework of the Treaty. It is not limited either to the three EU institutions (EP, Council and Commission), or to territorial representation, but extends to interest representation. P.Craig, op.cit. n.9, pp.36-41 and G.deBurca, ibid, pp.56 and 60. S.Smismans, op.cit. n.96, pp.92-3.

The current European treaties mirror only part of the 'institutional balance' as it exists in practice, that is, as to the way in which the legislative process really operates. Substantial elements of decision-making operate in the margins of or wholly outside the formal constitutional framework. For instance, executive rule-making in the EU is characterised by intricate institutional elements such as comitology committees and agencies that operate in a 'constitutional twilight zone', regulated only by a few treaty provisions, some case-law and secondary legislation as well as a number of declarations and interinstitutional agreements.[110] Institutional balance has been also described as euphemism which 'masks an inherent institutional tension between intergovernmentalism and supranationalism'.[111] This tension is reflected in features such as the complicated voting rules and the maze of intricate legislative procedures, which partly determine the relative influence of the different institutional actors. Further, informal institutional changes have occurred through the ways in which powers have been exercised by the various institutions and the developing relations between them, which now play an important role in the institutional structure of the Union.[112]

Consequently, the formal institutional framework and decision making of the Union are based on the principles of 'rule of law' and democracy, but what about those not reflected in formal constitutional arrangements? As Grainne deBurca observes, the development of EU institutional practice and the institutional framework in general pose a challenge to the normative constitution of the EU, which has not sufficiently adapted to accommodate those changes. This is not merely a cosmetic problem of lack of fit between the 'formal' and the 'real' constitution, since the normative constitutional sources (treaties, case law and other parts of the *acquis*) reflect important values and contain important safeguards.[113] The issue is not simply one of institutional imbalance which could – after the intervention of the ECJ – be adjusted by bringing the institutional practice into conformity with the treaty-based norm of institutional balance. The gap between institutional reality and formal constitutional rules is wide enough

[110] K.Lenaerts and A.Verhoeven, op.cit. n.96, pp.47-8.
[111] G.deBurca, op.cit. n.108, p.56.
[112] Ibid, p.65.
[113] Ibid, p.71.

to contest the democratic and legitimate underpinnings of European governance. A reinterpreted institutional balance to reflect the complex reality of EU institutional framework may serve as a tool to shape that framework.[114] As a result, the proper application and understanding of institutional balance will address effectively the issue of democratic deficit.

2.4 Conclusion

The debate on the democratic legitimacy crisis of the Union is relevant to its changing constitutional framework. What this chapter has done is to link the issue with the processes of European integration and constitutionalisation. The former saw the transformation of the EU order from a mere policy to a comprehensive polity process with a wide competence remit that has a direct impact on the organisation and function of the national legal and political orders as well as the everyday lives of the European citizens. The latter, while it was neither proclaimed in the treaties nor constituted an unforeseen consequence due to functional spillover, was primarily the product of the judicial will, of the consistent interpretation in the ECJ's jurisprudence of the nature of the EU legal norms and of the place of those norms within the legal system based on the Court's '*certaine idée de l'Europe*'.[115]

As seen, the institutional system of the Union, its objectives and policies are based on the two overarching principles of the rule of law and democracy, found also in the national political orders. Yet, the democratic underpinnings of the EU have been challenged, especially since the ratification crisis of the Maastricht Treaty in 1992, a challenge pertaining to both the role and function of individual institutions and the decision-making system as a whole. The new and historically unprecedented *sui generic* political entity, the EU, has brought with it disquiet

[114] S.Smismans, op.cit. n.96.
[115] O.Spiermann, op.cit. n.22, pp.763-4. A.Stone-Sweet, op.cit. n.21. E.Fossum and A.Menendez., 'The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the EU', (2005) 11 ELJ 380-413, p.391.

over the democratic deficit of its emergent system of governance, a perceived disconnection between institutions and voters as well as feelings of remoteness and lack of influence and involvement on the part of its citizens. Somehow, EU decision-makers are not sufficiently representative of and accountable to the people, while the decision-making process is organised in a manner that bypasses democratic channels. In this environment, institutional balance becomes relevant to the democratic legitimacy of the EU, because the way legislative powers are allocated among the EU institutions matters to the democratic quality of the EU legal order in terms of what institutions represent, which constituencies and how effectively. After an initial identification of the complex reality of the Union's institutional system, this theme will occupy the following chapters in the context of both the formal and informal institutional evolution of the EU with the ultimate aim to ascertain which institutional arrangements allow for sufficient democratic input.

CHAPTER 3

AN INITIAL ASSESSMENT OF DECISION-MAKING IN THE UNION

3.1 Introduction

In Chapter 2, a democratic regime was described as one in which popular rule is carried by democratic institutions. Based on the principle of popular control over decision-making, this chapter will offer an early assessment of EU decision-making against different attributes of democratic rule such as accountability, representation, transparency. An initial observation of the overall institutional system of the Union brings a number of issues into light. The Union may be served by a 'single institutional framework' normally in the form of an institutional triangle that consists of the European Parliament, the Commission and the Council but, in reality, decision-making takes place mainly within the latter. Therefore, it is important to firstly focus on how the Council's organisational infrastructure and internal workings affect issues of representation and accountability. Further, the evolving nature of the Union's institutional structure is not always reflected in formal constitutional amendments. If the institutional development of the Union materially outgrows the basic constitutional structure established by the treaties, can the EU claim that it is firmly based on the principles of democracy and the rule of law? It is also essential to democratic decision-making that information is available about policy processes and preferences, since this is likely to increase public support in the exercise of power. This formal, legalistic examination of the Union's institutional structure will be attempted with the aim to identify salient features of the legislative process that affect democratic legitimacy. The ultimate purpose of this initial assessment is to establish whether EU decision-making is inherently amenable to public scrutiny and influence.

3.2 Reflections on the Council

Legislative power is not described in the treaties. To attain the objectives and exercise EU competences, the treaties allocate powers to the institutions, an allocation that rests neither on a system of separation of powers nor on any general statement defining the usual functions of the institutions under the rule of law. Under Article 202 (ex 145) TEC, legislative power is assumed to belong primarily to the Council which acts jointly or with the participation of the EP.[1] The TEC expressly submits to the function of the Council as a legislator only in relation to access to documents (Article 207(3)). Apart from the general procedure of treaty reform found in Article 48 TEU,[2] it is conceivable for the Council to amend primary law under the treaties. These formal procedures take the form of smaller revisions whereby the Council acting unanimously, and occasionally by qualified majority,[3] is empowered to adopt decisions either 'autonomously' from national approval procedures or 'semi-autonomously', in the sense that a recommendation is made to the Member States to adopt such decisions according to their constitutional requirements. Again, the involvement of the other EU institutions varies according to particular cases and is normally reduced to a mere initiating or consultative role.[4] For instance, the Council on a proposal from the Commission and after consulting the EP may add to citizen rights already found in the treaties[5] or shall lay down the provisions regarding the direct elections to the EP by universal suffrage on a proposal from the Parliament and with its assent.[6] It may also decide to convert cooperation under the

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[1] The Commission also plays an important role in the Community pillar through its prerogatives to initiate legislation. The treaties delimit the respective roles of the institutions on a case-by-case basis according to a large number of procedures. However, according to the Treaty Establishing a Constitution for Europe (TeCE), Article I-23, the Council will share legislative, budgetary, policy-making and coordinating functions with the Parliament. CONV 50/02, 'The legal instruments: present system', 15.05.2002. CONV 162/02, 'The legal instruments: present system', 13.06.2002.

[2] This general amendment procedure seems to legitimise any formal constitutional and institutional reform, as this is attained by the common accord of national governments and receives the final seal of approval subject to national constitutional guarantees. The procedure is not subject to review by the European Courts.

[3] Article 107(5) TEC, Articles I-30 and III-187 TeCE.

[4] 'Reforming the Treaties, Amendment Procedures', Second report on the organisation of the EU Treaties submitted to the European Commission on 31 July 2000.

[5] Article 22 EC. The corresponding Article III-129 TeCE requires parliamentary assent instead of consultation.

[6] Article 190 (4) EC. In the corresponding Article III-330 TeCE, the Council can do that only after obtaining the EP's *consent*.

intergovernmental pillars into the Community pillar and determine the voting procedures.[7]

The Union's formal institutional structure has changed little since the Treaty of Rome (1957), especially with regard to the balance of power. To be more precise, the Council has always been at the centre of decision-making both as a strong executive and legislator, but never been subjected to parliamentary control at EU level. Therefore, in terms of institutional accountability, provisions on the composition and internal structuring of the Council are essential components of the institutional balance debate, since each of the institutions in theory at least represents a different constituency. The EP has highlighted that along with the process of decision-making, the composition and function of the institutions are important issues in democratic legitimacy as both can address questions of representation and accountability.[8] By virtue of Article 203 TEC, the Council shall consist of one representative from each Member State at ministerial level committing its government.[9] The Council's dominant role in the Union's institutional system and its lack of accountability at EU level may be offset by the indirect mandate it receives through the democratic and legitimate governments of the Member States. On closer inspection, the indirect link between the Council and individual citizens may in fact generate democratic deficit in the EU legislative process. This additional level of decision-making (at EU level) which is supranational and executive-oriented has affected the exercise of competences by national actors, specifically national parliaments and their control over national executives often guaranteed under national constitutions,

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[7] Article 42 TEU provides that action in areas referred to in Article 29, Title VI, TEU will fall under Title IV TEC. This provision has been omitted from the TeCE.

[8] The notion of institutional balance can be presented as a way of ensuring the adequate participation and representation of the different constituencies within the EC process. As seen in Chapter 2, this newer definition of institutional balance as 'interest representation' has been developed by Lenaerts and Verhoeven as well as by Craig and de Burca: S.Smismans, 'Institutional Balance as Interest Representation. Some Reflections on Lenaerts and Verhoeven', in *Good Governance in Europe's Integrated Market*, C.Joerges and R.Dehousse (eds), OUP, 2002, p.92. G.de Burca, 'Institutional Developments of the EU', in *The Evolution of EU Law*, P.Craig and G.de Burca (eds), OUP, 1999, p.60. J.Shaw, 'The Legal and Constitutional Implications of the Treaty of Nice', in *The Treaty of Nice Explained*, M.Boyd and K.Feus (eds), The Federal Trust, 2001, p.98. EP Report A5-0086/2000 on the EP's proposals for the IGC. Rapporteurs: Dimitrakopoulos and Leinen, PE232.758, 27.3.2000.

[9] Article I-23 TeCE. The TeCE adopts the existing provisions on Council composition and membership. Both the EC Treaty and the TeCE do not dictate the way Member States are to be represented in Council.

with an entailing overall decrease in democratic accountability and transparency.[10] This may be exacerbated by the new Article III-343 TeCE, which provides for the possibility of one Council member to delegate their voting to another Member State representative. A practical implication might be that members of the Council are hardly individually accountable to their national parliaments, let alone collectively to the EP.

Moreover, scrutiny of decision-making within the Council reveals that the institution is not really a 'unitary' body, but rather an abstract term covering several distinct fora. It is often described as a 'legal fiction' as its members will vary in accordance with the subject matter of the meeting in question, despite its treaty status as a single institution.[11] Decision-making in the Council takes place at the micro level of Working Groups (WGs), that is, at the level of communication networks of expert policy-makers operating within complex lines of authority, whose actions often duplicate and overlap, creating a system of regulatory government. In the decision-making process of the Council, the WGs have a more important function than the one that exists in the treaties whose communication behaviour is determined by formal and informal rules, supranational and intergovernmental cooperation, preferences and alliances,[12] the Ministers being the only visible level of the Council. At the apex of such subsystems stands the Committee of Permanent Representatives (COREPER) which consists of the permanent representatives[13] of the Member States to the Council and provides the groundwork for the Council's decision-making. In this sense, COREPER would be expected to present national preferences but, as delegations vary from state to state, they are not necessarily likened to national administrations. In most cases, decisions are adopted without debate, since they

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[10] For a detailed analysis, see Chapter 6.

[11] S.McGiffen, *The EU. A Critical Guide*, Pluto Press, 2001, p.16. Ch.Lord, *Democracy in the European Union*, Sheffield Academic Press, 1998, pp.24-5. S.Douglas-Scott, *Constitutional Law of the EU*, Longman, 2002, p.75. Ch.Lord, *A Democratic Audit of the European Union*, Palgrave, 2004, p.162.

[12] S.Douglas-Scott, ibid, p.78. J.Beyers and G.Dierickx, 'The Working Groups of the Council of the European Union: Supranational or Intergovernmental negotiations?' (1998) 36 JCMS 289-317, pp.291, 293 and 295. It is estimated that 80-90% of the Council's work is done in the working groups.

[13] Article 207(1) TEC, Articles I-24 and III-344 TeCE. Article 19 of Council Decision 2004/338/EC of 22 March 2004 adopting the Council's Rules of Procedure, OJL106/22, 15.04.2004.

have been prepared by the subsidiary organs and a consensus has already been established between the representatives of the Ministries.[14] The existence of specialised Council compositions and the various delegations of power within and away from the Council mean that it is an institution of uncertain external boundaries as well as internal complexity.[15] This makes it difficult to determine with certainty whose interests it represents and how it allocates political accountability.

Even the Council itself appears contradictory about its status as it has, on the one hand, claimed that it is a single body consisting of all its compositions, working groups and committees and, on the other, it has insisted that the Council Presidency is a separate institution.[16] According to Article 203 EC, political leadership of the Council falls to the rotating Presidency. The Member State holding the Presidency is responsible for its day-to-day management for a period of six months and, therefore, EU policy-making is dependent on an individual Member State rather than collective policy priorities, with the aim to further its own policy objectives.[17] The Presidency was a much debated issue at the European Convention, following the submission of the Franco-German plan on institutional reform which proposed the elimination of the present system of rotating presidency and was badly received by the smaller countries.[18] The rotation system was maintained in the Constitutional Treaty (TeCE) which stipulates in Article I-24 that the Presidency of all Council configurations, other than Foreign Affairs, is to be held by Member State representatives on the basis of equal rotation for a period of eighteen months. The new arrangements will achieve some continuity lacking from the current six-monthly rotating system,

[14] Despite the provision for majority voting, votes are rarely taken in the Council and some 85% of decisions are agreed at COREPER or working group level: S.Andersen and K.Elliassen, 'Formal Processes: EU Institutions and Actors', in *Making Policy in Europe*, S.Andersen and K.Elliassen (eds), Sage Publications, 2001, p.26.

[15] Ch.Lord, *A Democratic Audit of the European Union*, op.cit. n.11, p.163.

[16] S.Douglas-Scott, op.cit. n.11, p.82. Case T-14/98 *Hautala v. Council* [1999] ECR II-2489. Report of the Ombudsman for 1997 pp.176 et seq: application by Tony Bunyan for access to documents – complaint 1054/25.11.96, *Statewatch* v *Commission*.

[17] The Presidency may also restrict the numbers per delegation present in meetings and discussions, set the order in which the items are to be taken, as well as determine the duration of discussion on them. Article 20 of Council Decision 2004/338/EC, op.cit. n.13.

[18] CONV 489/03, Contribution submitted by Mr Dominique de Villepin and Mr Joschka Fischer, members of the Convention, 16.01.2003. CONV 646/03, Contribution submitted by Mr. Michael Attalides, *et al*, members of the Convention: 'Reforming the institutions: Principles and Premises', 28.03.2003.

although there is no reference to how these will take effect,[19] and are in essence a flexible 'team system' that may be altered without formal constitutional amendment, yet not less confusing if viewed especially in conjunction with the new provisions for a permanent President of the European Council (Article I-22).

The Council's formal structure was not dealt with constitutionally at Nice, as reforms were mainly limited to the issue of 'voting'. It was the European Council that embarked on a process of reform of the Council which started at Helsinki and concluded at Seville; with the aim to prepare the Union for enlargement, the process saw a reduction in the Council formations and provided for a more effective coordination among them. Consequently, in 2002, the Council annexed a list of nine configurations to its Rules of Procedure.[20] The Council's different formations that correspond to existing practice have been written down in the treaties in Article I-24 TeCE, following the European Convention and the 2003-4 IGC.[21] The Convention proposal to set up a separate Legislative Council was abandoned by the 2003-4 IGC due to strong misgivings by many Member

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[19] These were specified by the European Council in a declaration appended to the Final Act of the 2004 IGC: 'The Presidency of the Council shall be held by pre-established groups of three Member States for a period of 18 months. The groups shall be made up on a basis of equal rotation among the Member States, taking into account their diversity and geographical balance within the Union. Each member of the group shall in turn chair for a six-month period all configurations of the Council. The other members of the group shall assist the Chair in all its responsibilities on the basis of their common programme. Members of the team may decide alternative arrangements among themselves.': Cig 87/04 ADD2 REV2, Declaration to be annexed to the Final Act of the IGC and the Final Act, 25.10.2004; Declaration on Article I-24(7) concerning the European Council decision on the exercise of the Presidency of the Council, OJC 310/420, 16.12.2004. CONV 508/03, Summary report on the plenary session – 20-21 January 2003, 27.01.2003. This Draft Decision will be adopted, if, or when, the TeCE enters into force.

[20] Helsinki European Council Conclusions, Nr. 00300/99, 11.12.1999. *Guidelines for Reform and Operational Recommendations*, approved by the Helsinki European Council, 10-11.12.1999, available from http://ue.eu.int/en/info/eurocouncil/ index.htm, accessed 20.06.2001. Follow-up to the Helsinki European Council Conclusions on 10 and 11.12.1999 – Council Formations, OJ L 149, 23.6.2000. Goetenborg European Council Conclusions, SN200/1/01, 15-15.06.2001. Interim Report 15100/01, *Preparing the Council for Enlargement*, 07.12.2001. Seville European Council Conclusions, SN200/1/02, 21-22.06.2002. In the interests of representation and accountability the EP proposed a substantial reform of the Council and an actual separation of the institution between a legislative and executive institution: EP Report A5-0086/2000, op.cit. n.8. Annex I of the Council Decision 2002/682/EC, of 22 July 2002 adopting the Council's Rules of Procedure, OJL 230/7, 28.08.2002, now contained in Annex I of the Council Decision 2004/338/EC, op.cit. n.13.

[21] Two configurations are specifically mentioned, the General Affairs Council (GAC) and the Foreign Affairs Council (FAC). The former is responsible for ensuring consistency in the work of the various configurations, while the latter elaborates the Union's external action. The Article also provides for a European decision adopted by the European Council to establish a list of other configurations in which the Council may meet.

States.[22] It was felt that the legislative work of the Council currently spread across a number of different formations was risking an overly specialised approach with legislation taking insufficient account of wider interests, while the increasing range and complexity of the issues it had to address had led to less coherence and more conflict between the different formations.[23] This striking innovation would have introduced an overarching 'legislative' body, a unitary institution replacing the existing sectoral configurations. Instead, the Council was left 'untouched by Montesquieu's idea of separation of power'[24] between the legislative and the executive. The new provision, if it ever comes into effect, will nevertheless require each Council meeting to be divided in two parts, dealing respectively with deliberations on legislative acts and non-legislative activities. This will entail a degree of separation between the Council's legislative and executive functions and will render its workings more transparent, which is not currently the case.

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[22] CIG 1/03, The Council Presidency, 03.10.2003. CIG 35/03, Reply from the Commission to the questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers (doc. CIG 9/03), 15.10.2003. CIG 36/03 and 39/03, Council Presidency and Council formations, 16 and 24.10.2003. P.Craig, 'Institutional Structure: A Delicate Balance', (2005) 1 EuConst 52-56, p.53.

[23] The GAC and the External Relations Council particularly had proved unable to coordinate the work of other Council formations effectively. The European Council in Seville decided to limit the number of formations to nine and to hold separate meetings of the two main areas of activities, that is, the GAC and the External Relations Council. The Convention Working Group VII (External Action) formally separated the two formations: CONV 459/02, Final Report of the Working Group VII on External Action, 16.12.2002 and CONV 477/03, 'The Functioning of the Institution', 10.01.2003.

[24] P.Norman, *The Accidental Constitution – The Making of Europe's Constitutional Treaty*, EuroComment, 2005, p.116.

3.2.1 The parameters of decision-making in the Council

Despite the regular but very moderate institutional reform over the past two decades, the issue of voting procedures in the Council has always been on the agenda as the Member States normally favour at least in principle the extension of qualified majority voting (QMV). At the 2000 IGC, unanimity was generally regarded fundamentally inappropriate to effective decision-making in an enlarged Union of diverse members as the risk of deadlock would entail significant loss to the Union's operating ability. Some Member States even argued that the possibility of majority decisions would result in greater receptivity to compromise, opening the road for a more democratic decision-making process; progress towards greater democratisation entailed the implementation of principles which could be recognised by European citizens, such as the principle of majority voting.[25] Unsurprisingly, QMV was also at the centre of the debates in the Convention.[26] From the beginning it raised two delicate issues, namely, whether it should be extended and whether its definition should change. The extension of QMV to new substantive areas in every treaty revision is a move away from a consensual conception of decision-making towards a more majoritarian one that reinforces the supranational character of the Union.

At the 2000 IGC, the Commission advocated that the debate on extending QMV should focus on large categories of decisions rather than individual cases, whereas some Member States were willing to examine the issue on a case-by-case basis. What prevailed was the Portuguese Presidency's approach which distinguished between articles to be examined for straightforward transition to QMV and provisions for which a move to QMV could be considered only for

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[25] See for instance, CONFER 4719/00, Memorandum from the Greek Government to the IGC on institutional reform of the EU, 03.03.2000. CONFER 4722/00, Contribution from the Danish Government, 07.03.2000. CONFER 4720/00, Contribution from the Dutch Government, 06.03.2000. CONFER 4751/1/00, Reweighting Member States' votes in the Council of the EU, 16.6.2000. IGC: Reform for Enlargement. Cm 4595, The British Approach to the EU IGC, February 2000. CONFER 4723/00, Contribution from the Finnish Government-Background and objectives of the IGC 2000, 7.3.2000. CONFER 4712/00, Basic principles of Austria's position, 15.2.2000. COM(2000)34, *Adapting institutions to make success of enlargement*, 26.01.2000.

[26] CONV 548/03, Summary Report on the plenary session, 6-7 February 2003, 13.02.2003. See also, CONV 60/02, Note on the plenary session, 23-4 May 2002, 29.05.2002.

certain, specific and clearly defined aspects.[27] The Treaty of Nice to some extent widened the scope of decision-making by qualified majority, as twenty seven provisions changed over completely or partly from unanimity to QMV. For instance, provisions in Title IV TEC, regarding visas, asylum, immigration and other policies linked to the free movement of persons, apparently fundamental issues for EU citizens, were agreed on a partial and deferred switch to QMV by means of different instruments (amendments of Article 67 EC, protocol or political declaration) and subject to different conditions (either from 1.5.04, or after the adoption of Community legislation setting out the common rules and essential principles).[28]

It is obvious from the stance of the EU institutions and the Member States during treaty negotiations that, to remain efficient and effective, the Union had to make use of majority voting in its decision-making. However, the range of applications of the rule remained qualitatively limited, less than what both the Commission and the Member States had proposed. There was a broad consensus in favour of retaining unanimity for the provisions relating to the constitutional and institutional structure of the EU, those with intergovernmental character (eg. foreign policy and immigration) as well as sensitive domestic policies like taxation and social security.[29] On top of that, moving to QMV has been deferred or has been made conditional in several areas. The outcome at Nice is a quantitative advance in terms of the number of instances when QMV may be used, but still leaves issues requiring unanimity.[30] And although such policy areas may be instrumental to preserving national sovereignty, viewed in the context of a Union of twenty five or more members, one needs to assess the extent to which Nice has *materially* and pragmatically prepared the EU for enlargement.

Such pragmatic assessment was undertaken by the Convention in 2003; QMV played a central part in the institutional reform of the EU and was directly

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[27] CONFER 4755/00, Follow-up to the Feira European Council, 05.07.2000.
[28] SEC(2001)99, Memorandum to the Members of the Commission, European Commission, 18.01.2001.
[29] Ibid.
[30] M.Barnier, 'Reforming the Institutions for Enlargement: A Commission Perspective', in *The Treaty of Nice Explained*, op.cit. n.8, pp.118-9 and 130-1.

associated with enlargement. The Convention advocated the widening of the field of application of QMV both in quantitative and qualitative terms. The 2003-4 IGC agreed with the broad thrust of these proposals[31] and established QMV as the general rule of decision-making in the Council. Currently, under Article 205 EC, unless the treaties provide otherwise, the Council shall decide by simple majority which is rarely the case as in the vast majority of cases the treaties refer to QMV or unanimity. Article I-23 TeCE reverses this approach by eliminating the need for reference to QMV, a move that will simplify the legislative process. By further restricting the use of unanimity in Council, decision-making will become more effective both materially and pragmatically in an enlarged Europe. The Convention, and particularly the Praesidium, found a more incisive way to retain the veto power; it shifted the institutional balance to favour the European Council by enhancing its role in the legislative process.[32]

Over successive enlargements, the relative weight of the Member States with smaller populations had increased to the detriment of those with larger populations. As a result, the system of weighting of votes under Amsterdam was not demographically comparable. During the 2000 IGC, Member States were concerned about the impact of Amsterdam weighting rules on the democratic legitimacy of the EU. With the accession of the new states in 2004 consisting of small to medium-sized populations, if the system under Amsterdam had been maintained, their power would have increased even more disproportionately. The larger Member States would find themselves compelled to accept decisions taken

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[31] In certain sensitive areas the IGC thought that the extension of QMV had gone too far and unanimity was reintroduced in several key areas, notably tax and own resources (the Union's system for raising finance).

[32] QMV is to apply to eighteen new areas, including the citizens' initiative provision on Article I-47 and permanent structured cooperation in defence Article III-312. It is extended to around twenty old articles, including the sensitive areas of justice and home affairs, asylum and immigration. Unanimity is preserved in sensitive areas like CFSP, save initiatives of the Minister of Foreign Affairs where the Council will act by QMV when adopting decisions on the actions and positions of the Union and actions implementing those (Article III-300). In three areas, specific clauses have been introduced to allow a Member State to refer a matter to the European Council (known as 'emergency brake' clauses). This mechanism has allowed the application of QMV to these articles. These are Article III-136 on free movements of workers/social security, Article III-270 on judicial cooperation in criminal matters and Article III-271 on the approximation of definitions of criminal offences. A new 'bridging clause' will allow a matter to be passed after a final vote by unanimity in the European Council to a QMV under Title III (internal policies and actions) of Part III of the TeCE.

by a group of states representing a minority of the European population,[33] while a process should be treated as democratic, if it reflects the basic principle of equality of the Member States within the Union.[34] Likewise, what makes the decision-making process democratically legitimate within states is equal (voting) power per citizen. In the EU, a polity of both states and peoples, it is difficult to apply such a simplistic equality principle. Yet, as identified in Chapter 2, democratic systems need to provide all citizens with the opportunity to participate equally in the political life of the state and, in the case of the Union, the EU polity.

The 2000 IGC negotiations looked at the issue of vote weighting in the Council along the parameters of a system that needed to be legitimate for both Member States and their citizens. The objectives of reforming the Amsterdam system should ensure a more representative balance between Member States and reflect their demographic differences. When the Conference came to address the issue, it did not start from scratch; all Member States were willing to abide in principle by the agreement reached at Amsterdam which vaguely provided for two main options: dual majority and reweighting of votes.[35] Consultations with the Member States examined both options; the latter gained more support. Moreover, the smaller Member States, and especially Austria, advocated a link between changes in the size of the Commission and the weighting of votes in the Council, in order to offset the loss of influence due to vote adjustment.[36] The outcome of Nice represented a satisfactory outcome for all negotiating parties in terms of

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[33] COM(2000) 34, CONFER 4751/1/00, 4722/00 and 4720/00, op. cit. n.25. CONFER 4733/00, Policy document of the Federal Republic of Germany on the Intergovernmental Conference on institutional reform, 30.03.2000.

[34] CONFER 4719/00, op. cit. n.25. R.Baldwin, *Nice Try: Should the Treaty of Nice Be Ratified?*, Centre for Economic Policy Research 2001, p.35.

[35] CONFER 4755/00 op.cit. n.27. Protocol on the institutions with the prospect of enlargement of the EU, annexed to the Treaty of Amsterdam but repealed and replaced by a new Protocol on Enlargement by the Treaty of Nice. EP Report A4-0049/99 on the decision-making process in the Council in an enlarged Europe. Rapporteur: Bourlanges, PE229.066, 28.01.1999. EP Report A5-0086/2000, op. cit. n.8. EP Report A5-0168/2001 on the Treaty of Nice and the future of the European Union. Rapporteurs: Íñigo and José, PE294.755, 04.05.2001. CONFER 4733/00, op. cit. n.33. CONFER 4751/1/00 and 4722/00, op. cit. n.25. CONFER 4717/00, Italy's position to the 2000 IGC, 03.03.2000.

[36] CONFER 4723/00 and 4712/00, op. cit. n.25.

achieving their own political objectives.[37] An adjustment in vote weighting in Council was compensated by the loss of the second seat in the Commission.

The generally accepted aim of reweighting was to ensure that any winning coalition under QMV would represent a reasonable majority of the population and that decisions could not be blocked by too small a minority.[38] The compromise found may be dubbed a kind of a 'triple majority' system in which three separate conditions need to be met in order to achieve a qualified majority, namely, a majority of weighted votes and of members in the Council as well as a majority representing at least 62% of the Union's population.[39] All Member States receive an increased number of votes, but in different proportions. The threshold is to be adjusted proportionally with every accession. The reweighting will take place in stages, the number of which will depend on the number and timing of the future waves of enlargement.[40] Equally important is the fact that the relative demographic weight is now explicitly stated for the first time as a condition for decision-making. But it is just a condition rather than an essential requirement and it exists as a 'safety net' in the sense that it provides the opportunity, especially to the larger Member States, to form a 'blocking minority', if they are not happy with a decision.

Although in a way it reflects the dual nature of the Union, as one of citizens and Members States, the requirement of a triple threshold renders the system contentious. Given the need to fulfil three separate conditions as well as meet a higher QMV threshold as the Union expands, the final outcome is complex, difficult to explain and undoubtedly runs counter to the general desire at the start of the negotiations not to make Council decisions more difficult. Moreover, there is the further technical complication of how to verify the population criterion,

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[37] D.Galloway, *The Treaty of Nice and Beyond*, Sheffield Academic Press, 2001, p.89.
[38] Dr.E.Best, 'The Treaty of Nice: Not Beautiful but It'll Do', EIPASCOPE No.2001/1. The new regime was only going to come into force after the accession of new states in 2004, by which time, paradoxically, a new Treaty was expected to have been negotiated. And, actually, in July 2004 a draft Constitutional Treaty was formally agreed to by all Member States and signed by October 2004.
[39] Article 205 TEC. Article 3 of the Protocol on the Enlargement of the EU, Declaration 20 on the Enlargement of the EU and Declaration 20 on the Qualified Majority Threshold and the Number of Votes for a Blocking Minority in an Enlarged Union, all annexed to the Treaty of Nice. Brussels European Council Conclusions, Nr.14702/02, 24-25.10.2002.
[40] Article 3 of the Protocol on the Enlargement of the EU, annexed to the Treaty of Nice.

which is clearly stipulated in the Treaty as a verifiable condition for adopting legally binding acts.[41] These new rules are likely to slow down the decision-making process and seem to favour the preservation of the legislative *status quo* – resulting from unanimity – which, to some commentators,[42] enhances the margin of discretion of the executive (the implementing rules become more important) and the judiciary which will tend to a more sustained form of activism because there is less likelihood of being overruled.

The current system tries to remedy the domination of the small Member States, which were previously overrepresented, as against the larger ones, but it is unable to prevent the domination of groupings, consisting of small and larger countries, that may lead to the alienation of other Member States. How may one reconcile this prospect with the aim of equal representation arguably inherent in the Nice rules? Also, the minimum number of countries that can block decision-making on the basis of a given percentage under the new system is almost the same as the one under Amsterdam; only the combination of states differs. So the parameters of the new weighting rules are the same, save the demographic verification clause that benefits one particular Member State, that is, Germany. [43] In terms of democratic legitimacy, the Nice system seems to contribute nothing *material.*

Testament to the perceived inadequacy of the Nice system of weighing votes in the Council was the fact that it was once again subject to review just as the Treaty entered into force in February 2003. The Convention proposed a completely new system of QMV known as 'double majority': the majority of Member States and the majority of the population. The issue was at the heart of the 2003-4 IGC which approved the principle proposed by the Convention adding certain amendments to facilitate the transition to the new system introduced by the TeCE, which can be considered a real revolution in Council decision-making. Firstly, it has been made much simpler. Instead of the current

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[41] D.Galloway, op.cit n.37, p.90.
[42] X.Yatayanas, 'The Treaty of Nice. The Sharing of Power and the Institutional Balance in the EU-A Continental Perspective', JMWP 1/01.
[43] Under the Treaty of Amsterdam, three large states may block, but under the Treaty of Nice, two large and a medium-sized can. Report A5-0168/2001, op.cit. n.35.

system (threshold of weighted votes, majority of Member States and 62% of the population of the Union), once subject to long and difficult negotiations at Nice, just two criteria will apply. Under Article I-25 TeCE, a QMV can be achieved only if a decision is supported by 55% of Member States, including at least fifteen of them, representing at the same time at least 65% of the population.[44]

Is there a difference between the simple vote reweighting, coupled with the Member State and population 'safety nets', agreed at Nice and a 'weighted' dual majority system proposed by the Commission, the EP and a few Members States during the 2000 IGC? As David Galloway remarks,[45] if there is any difference, it exists in the 'eyes of the beholder'. In a way, the two approaches (dual majority and reweighting), often proposed as different concepts in the 2000 IGC negotiations, are in fact variants of one and the same system attempting to reconcile both the state and population elements. However, the outcome at Nice owed more to negotiating styles than logic,[46] as the loss of influence by the smaller Member States represented a considerable variation of their per capita representation in Council. On the other hand, the 'double majority' rule is likely to achieve a simpler and more flexible system of decision-making as it can facilitate a greater number of combinations of Member States that can constitute a QMV which will make a difference in an enlarged EU. It also takes into account the twofold nature of the Union - a polity of states and peoples - in a more equitable manner in terms of representation of individual voters in that it reinforces proportional representation by emphasising the will of a majority of the population over that of the states in the adoption of binding acts.[47]

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[44] In Declaration No.5 on Article I-25 and the draft decision contained therein, annexed to the Constitutional Treaty, it is envisaged for the new system to take effect on 1 November 2009. Modification of criteria for counting the majorities may occur in three situations: regarding acts not proposed by the Commission, specific transitional clause in the event of a narrow majority and the blocking minority. The latter has to consist of four Member States at least and will have to represent at least 35% of population. The effect of the rule is mitigated by a mechanism reminiscent of the 1994 'Ioannina' compromise; Member States with less than a blocking minority, but representing three-quarters of such a minority in terms of population or numbers of Member States will be able to call on the Council 'to do all in its powers' to reach a solution. On the 1994 'Ioannina' compromise, see S.Weatherill and P.Beaumont, *EU Law*, Penguin Books, 1999, pp.87-8.

[45] D.Galloway, op.cit n.37.

[46] P.Norman, op.cit n.24, p.117.

[47] W.Van Gerven, *The European Union. A Polity of States and Peoples*, Hart Publishing, 2005, pp.283 and 286.

3.3 The empirical reality of the evolving EU architecture

As highlighted in Chapter 2, due to its evolutionary nature, the EU defies precise definition as a polity. The Union's incremental, ongoing integration process and the ensuing difficulty to constitutionally describe its multilevel decision-making, which occurs through a complex and interwoven pattern of intergovernmental and supranational structures, reveal a hybrid organisation of intrinsic complexity.[48] Whether constitutionalised or not, the Treaties afford a set of legal rules that regulate the legislative process and the tasks of the institutions therein. Although under Article 3 TEU a single institutional framework is to ensure the consistency and the continuity of the Union activities, the rules that regulate the exercise of public power are not themselves based on consistent and often visible criteria across the Union pillars; the fragmentation of decision-making means that the institutions are subjected to diverse roles, principles and voting rules. The duty to attain the Union's objectives through legislative activity must be taken to refer overwhelmingly to the Council which is both the forum of interstate bargaining and supranational decision-making; under the second and third EU pillars there is little supranationalism and it is the Council[49] which takes the main decisions, whereas the EP and the Commission play a negligible role and the ECJ[50] may be denied jurisdiction to adjudicate on legal acts adopted.

In this context, the aim of implementing a single institutional framework appears redundant due to the significant variation endorsed by the pillar structure. This may lead to compartmentalisation and duplication of action, as decisions adopted

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[48] R.Bieber and C.Amarelle, 'Simplification of European Law', in *The Europeanisation of Law - The Legal Effects of European Integration*, F.Snyder (ed), Hart Publishing, 2000, p.223. W.Merkel, 'Legitimacy and Democracy: Endogenous Limits of European Integration', in *Regional Integration and Democracy*, J.Anderson (ed), Rowman & Littlefeld Publishers, 1999, p.47.

[49] Articles 14 and 15 TEU (CFSP Title V TEU) provide that the Council shall take joint actions and adopt common positions with the aim of implementing CFSP. For third pillar matters, under Article 34 TEU (PJC Title VI TEU), the Council may adopt common positions, framework decisions, or establish Conventions.

[50] For instance, under article 46 (ex article L) TEU, the ECJ still has no powers to adjudicate on matters of CFSP. Article 46 TEU does not exclude the ECJ's jurisdiction to assess, under article 47 TEU, whether an act adopted by the Council, pursuant to Title V or VI TEU, is in fact within the scope of the EC Treaty and thus reviewable under Article 230 EC. Hence, the Court is prepared to annul a legal measure adopted in the context of the CFSP (or CJHA), if the measure is found to encroach upon the powers conferred on the Community by the TEC: Case C-170/96 *Commission v Council* [1998] ECR I-2763, paras.13-17.

under the intergovernmental pillars often overlap with Community policies, creating institutional and constitutional blurring.[51] In the case of external action, for instance, the Treaty of Maastricht introduced Article 301 TEC economic sanctions to implement political decisions adopted under the second pillar. Regardless of the political dimension of decisions dealing with a policy *vis-à-vis* a third state, the actual actions are often of economic nature. Yet, the Council *shall* take Community measures, only when this is required in a CFSP act. In essence, the obligation becomes redundant, since many decisions omit to refer to the necessity of implementing Community measures.[52] In very few cases there is explicit reference to an essential Community decision, like the Common Position 1999/273/CFSP, where 'action by the Community was needed in order to implement the measures cited' in the decision.[53] In almost all cases, CFSP decisions simply echo UN Resolutions by which the economic sanctions were established in the first place. *Prima facie* it would make more sense, if EC decisions would directly follow these Resolutions. However, the very existence of Article 301 makes independent EC decision-making very difficult.[54]

The 'governmental' element of the Community method did not only prevent the Member States from extending it to the fields of CFSP and JHA, but also the balance between the supranational and intergovernmental approaches within the single institutional framework have formally remained undetermined. Yet, the Union's institutional architecture is more than the sum of its parts. As the analogy between the EU's external action and CFSP has manifested above, the Union pillars are linked by institutional dynamics. The evolutionary nature of the

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[51] G.deBurca, op.cit. n.8, p.66. J-L.Quermonne, 'The Question of a European Government', Research and European Issues No.20/02.

[52] For instance, Common Position 95/254/CFSP of 7 July 1995 defined by the Council on the basis of Article J.2 of the Treaty on European Union with regard to the extension of the suspension of certain restrictions on trade with the Federal Republic of Yugoslavia (Serbia and Montenegro), OJL 160/2, 11.07.1995, and Council Decision 95/11/CFSP of 23 January 1995 concerning the common position, defined on the basis of Article J.2 of the Treaty on European Union, and regarding the extension of the suspension of certain restrictions on trade with the Federal Republic of Yugoslavia (Serbia and Montenegro), OJL 20/2, 27.01.1995.

[53] Paragraph 4, Preamble. OJ L108/1, 27.4.1999. In Decision 98/426/CFSP on a ban of flights by Yugoslav carriers between the FRY and the EC, it was merely said that 'a further reduction of economic relations with the FRY should be foreseen'. No explicit reference to EC measures.

[54] R.A.Wessel, *The European Union's Foreign and Security Policy*, Kluwer Law International, 1999, p.309. For a detailed analysis of the specifics of decision-making in the three pillars, see A.Arnull and D.Wincott (eds), *Accountability and Legitimacy in the European Union*, OUP, 2002, Chapters 2-4.

EU institutional system is also apparent from the frequent changes in primary law, such as the communautarisation of the third pillar by the Treaty of Amsterdam. The matters that remained in the area of intergovernmental cooperation underwent substantive refinement, especially in the areas of police and criminal justice cooperation.[55] Under the Constitutional Treaty, the merging of the pillars and the endowment of the Union with legal personality[56] is set to clarify the Union's institutional architecture and legal status. Although due to the present lack of formal legal personality, the EU is often conceived as not having legal existence of its own, as Bruno de Witte rightly remarks,[57] the merging of the treaties is probably not something new; the TeCE is only to codify existing practice. As the objectives, powers and practice of the Union are currently spread across pillars, there is a growing acknowledgement that the EC is more like a suborganisation of the EU.

The incorporation of the second pillar into the general legal framework of the TeCE is of formal significance only since most formal intergovernmental features of cooperation under CFSP remain intact. Namely, the Member States share legislative initiative with the Commission, QMV remains the exception and there are specific provisions governing the respective roles of the ECJ and the EP. According to the final report of the Working Group on legal personality at the Convention,[58] neither the merging of legal personalities nor the merging of the treaties automatically entails the merging of the pillars, but it was thought that to preserve the current design of the pillar structure in a single treaty would be anachronistic. It would, moreover, be a needless complication since all the institutional and procedural features specific to the two intergovernmental pillars (CFSP and cooperation in criminal matters), which the Convention considered appropriate to maintain, could be preserved in the new constitutional treaty.

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[55] R.Bieber and C.Amarelle, op.cit. n.48, p. 224.
[56] Establishment of the Union in Article I-1 TeCE and legal personality in Article I-7 TeCE. EP Report A5-0409/2001 of 21 November 2001 on the legal personality of the European Union. Rapporteur: Carnero-González, PE304.279, 21.11.2001.
[57] B.De Witte, 'Simplification and Reorganization of the European Treaties', (2002) 39 CMLR 1255-1287, p.1267.
[58] CONV 305/02, Final report of Working Group III on Legal Personality, 01.10.2002.

But even the communautarisation of intergovernmental pillars during successive treaty reforms would be hardly realised without derogations contemplating 'enhanced cooperation' among subgroups of Member States which shape decision-making according to variable geometry and somewhat reflect a reversal, from the 'community-method' to intergovernmental. The insistence to subject sensitive issues to intergovernmental cooperation may be an implicit recognition that only the Member States can legitimately legislate in sensitive to national sovereignty policy areas. As Eileen Denza remarks,[59] 'if the only option available were the Community method or no legal framework at all, the Member States would in some contexts choose to have no legal framework'. Maybe this approach is realistic as it acknowledges that different policies call for different approaches.[60] Therefore, it would be appropriate to say that, even under the Constitutional Treaty, the Community method is a synthesis of the supranational and intergovernmental elements of decision-making, while the Council is increasingly under the tight rein of an intergovernmental body *par excellence*:[61] the European Council.

3.3.1 The European Council's strategic leadership in decision-making

The European Council is said to be a 'source of gravitas' of the integration process by setting and steering major integration goals such as enlargement, which also shape the scope of institutional reform.[62] It increasingly seeks to assert its leadership role in both the political and institutional development of subject sensitive issues like Economic Growth[63] as well as Freedom, Security

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[59] E.Denza, *The Intergovernmental Pillars of the EU*, OUP, 2002, p.5.
[60] G.Milton and J.Keller-Noellet, *The European Constitution - its origins, negotiation and meaning*, John Harper Publishing, 2005, p.54.
[61] J-L.Quermonne, op.cit. n.51.
[62] Copenhagen European Council Conclusions, Nr. 15917/02, 12-13.12.2002. S.Douglas-Scott, op.cit. n.11. p.96-7.
[63] Brussels European Council Conclusions of 20-21.03.2003, Nr. 8410/0320. Brussels European Council Conclusions of 16-17.10.2003, Nr. 15188/03. Brussels European Council Conclusions of 25-26.03.2004, Nr. 9048/04.

and Justice.[64] Especially in the area of Justice and Home Affairs (JHA) the European Council's initiatives are quite ambitious.[65] Having laid the foundations for action and established the cross-border prosecution agency 'Eurojust' at Tampere, it further developed and adopted a new multi-annual programme, known as the Hague Programme, which deals with all aspects of policies relating to the area of freedom, security and justice, including their external dimension, notably fundamental rights and citizenship, asylum and migration, border management, integration, the fight against terrorism and organised crime, justice and police cooperation, and civil law.

The European Council is not an institution responsible for attaining the objectives of the EU, pursuant to Article 7 EC. Therefore, the European Council does not appear to be bound by the constitutional principle of attribution of powers and the obligation to act within the limits of its powers found therein. Still, it seems to fulfil a 'perceived need for a focus of authority at the highest political level' and has developed into a system of 'institutional summitry' which has detracted from the power of the three institutions.[66] As Peter Ludlow rightly observes,[67] the European Council's responsibilities are comprehensive rather than limited to the extent that the reference, made in Valerie Giscard d'Estaing's first Convention Draft, to the institution as 'the highest authority of the Union' is simply a statement of fact. By simply reading the presidency conclusions, one may find ample evidence that it is the European Council that determines what the other institutions can or cannot do. It plays a very important role in the political process of the EU by setting strategic guidelines and generating political impetus, taking general policy decisions, but most importantly, directing the evolution of the Union. Therefore, it was an inevitable outcome that the Convention reviewed the basic institutional set up of the Union to constitutionalise the European

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[64] Brussels European Council Conclusions of 17-18.06.2004, Nr. 10679/2/04 REV2.
[65] See Tampere European Council Conclusions of 15-16.10.1999, Nr. 200/1/99. Brussels European Council Conclusions of 4-5.11.2004, Nr. 14292/1/04 REV1. Brussels European Council Conclusions of 16-17.06.2005, Nr. 10255/05.
[66] DeBurca, op.cit. n.8, p.64. Andersen and Eliassen, op.cit. n.14, p.27.
[67] P.Ludlow, *A View from Brussels. Leadership in an Enlarged EU*, Briefing Note Vol.3, N.8, EuroComment, 2005, p.31.

Council's institutional role.[68] The political leadership structure of the Union is further reinforced by the permanent leadership in the European Council. With a permanent President, 'the European Council is not just an event, it is a process.'[69]

The European Council's constitutional role, as envisaged in the treaties, is political rather than legal. Its function of setting strategic guidelines and generating political impetus is delineated in Articles 4 and 13 TEU as an initial procedural step. Yet, it often emerges as the *de facto* higher level decision-maker in the EU without constitutional foundations for this role. At Lisbon, the European Council endorsed the 'knowledge-based Europe' project and, there onwards, it invented and codified a new method of open coordination in the field of employment involving, among other things, benchmarking and measuring best practice through commonly agreed indications and scoreboards.[70] Article 128 TEC generally allows for the European Council to play a minimal role in policy-making in terms of assessing the employment situation in the Union, adopting conclusions and providing guidelines for the Member States. Employment is also one of the objectives of the EU, found in Articles 2 and 3 TEC, to be attained by the Community institutions and no such role is ascribed to the European Council. Even though the method involves all three components of the 'institutional triangle' – EP, Council, Commission – the European Council is in the driving seat.[71] This may not be strictly speaking a new legal basis for action in the field of employment, but it may be interpreted as an implementation of Article 128.

It seems that, again, reservations about the 'governmental' element of the Community method with the ever-expanding use of QMV give decision-making by consensus a new lease of life by the increasingly powerful European Council. This is evident in Article 11(2) TEC[72] and Article 23(2) TEU[73] where 'problematic' areas of decision-making appear to be transferred to a higher

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[68] In Article I-19 TcCE, the European Council is formally recognised as an institution of the Union in its own right even though its function will continue to be confined to issuing general policy guidelines, without any participation in the legislative process.
[69] P.Ludlow, op.cit. n.67, p.33.
[70] Lisbon European Council Conclusions, Nr. 100/1/00, 23-24.03.2000. Part II, Barcelona European Council Conclusions, Nr: 100/1/02, 15-16.03.2002.
[71] Jean-Lois Quermonne, op.cit. n.51.
[72] Right of veto at European summits disappears with Nice.
[73] Member States who want to block decisions can still do it at the European Council level.

institutional level – from the Council to the European Council - and even more so in the new Constitutional Treaty where, in provisions like '*passarelle*',[74] 'emergency brake' procedure[75] and the general 'bridging' clause,[76] the European Council appears to exercise a legislative function contrary to Article I-20 TeCE which expressly precludes such role for the institution. The Constitutional Treaty further stipulates that certain decisions of more institutional nature will be taken by the European Council, such as the composition of the EP (Article I-20), the arrangements for the rotating presidency of the Council (Article I-24) and the system of equal rotation for the composition of the Commission (Article I -26).

The notion of 'institutional balance' which rests on a trialogue between the Parliament, Council and Commission detracts from the fact that some important changes that have taken place outside the formal institutional framework, have still become a central element of the institutional system.[77] At face value, the provision of a policy impetus appears to subsist in order to facilitate the decision-making in the Council, rather than upset the institutional *status quo*. Yet, the impact of the European Council's leadership role on gearing the Council's institutional reform and on the Commission's traditional right of initiative

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[74] Article IV-444 TeCE. This procedure will allow the European Council in future to decide by unanimity, without treaty revision, upon the transfer of new policy areas from unanimity to QMV. This rule marks a major relaxation of existing rules which require both an IGC and a ratification process in each Member State to facilitate a shift from unanimity to QMV. However, obtaining unanimous agreement to unlock the *passarelle* may be difficult particularly due to the power of a single national parliament to block a unanimous decision of the European Council to remove the national veto from areas of legislation in Part III TeCE.

[75] In the three sensitive areas where QMV applies, namely, free movement of workers/social security (Article III-136), judicial cooperation in criminal matters (Article III-270) and approximation of definitions of criminal offences (Article III-271), a Member State may appeal to the European Council, in which case the legislative procedure is suspended. The European Council must discuss the proposal in question and within three months either send the draft back to the Council, which will continue with the procedure taking into account the discussions within the European Council, or ask the Commission to present a new draft, which means the initiative considered not to have been adopted.

[76] Out of the four old legislative procedures only codecision is retained as an ordinary legislative procedure. New special legislative procedures are envisaged. Article I-34 states that in certain cases specified by the Constitution laws and framework laws may be adopted by the Council alone or more rarely by the EP alone rather by the two jointly. A general 'bridging clause' offers the option of switching to the ordinary legislative procedure; this can be authorised by the European Council acting unanimously (Article III-444).

[77] H.Wallace, 'Designing Institutions for an Enlarging European Union', in *Ten Reflections on the EU Constitutional Treaty for Europe*, D.deWitte (ed), 2003, p.97, CONV 703/03, Study by the EUI presented by Vice-President Amato, 2 April 2003, p.90.

requires attention. As Joerg Monar observes,[78] much of the Tampere agenda could have been formally proposed by the Commission. The same stands for employment policy. The European Council is not strictly an institution (listed in Article 7 EC), but it would be unrealistic to deny it any longer a place in the broader institutional framework of the Union.[79] Under the new TeCE provisions, its formal institutional role, combined with the Presidency, inserts the European Council into the institutional system as an autonomous institution and not as a special formation of the Council. From the perspective of democratic legitimacy, the European Council's role is not unproblematic as its decisions are not subject to parliamentary control at either EU or national level.[80] Conventionally, the acceptability of this situation rested on the fact that its decisions were not legally binding. Currently, its lack of institutional status means that it is not subject to the jurisdiction of the ECJ, and consequently to the rule of law, unless it encroaches on actions taken by the EC institutions under the Treaty.[81] Far from being a victory for democracy, any reluctance to constitutionally realise the true extent of the European Council's position in the Union's institutional architecture deflects from the necessity to make it more accountable.

3.3.2 Interinstitutional dynamics and the use of 'soft' law [82]

Interinstitutional relations are a key aspect of the EU legislative process. The treaties govern only the basic principles of the operation of the specific legislative procedures and set out the general competences of the institutions,

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[78] J.Monar, 'Decision-making in the Area of Freedom, Security and Justice', in A.Arnull and D.Wincott (eds), op.cit. n.54, pp.67 and 70.

[79] Maybe that is the intention of Article 3 TEU which does not list specific institutions as does Article 7 TEU.

[80] Unless the *passarelle* clause comes into effect, which gives national parliaments considerable power in relation to the European Council.

[81] Case C-170-96, op.cit n.50. S.Douglas-Scott, op.cit n.11, p.96. Under Article 47 TEU, the incorporation of the European Council into the EU Treaty did not change the powers conferred on the institutions by the Community Treaties.

[82] A comprehensive analysis of the nature and role of 'soft' law instruments in the EU legislative process is outside the main scope of the present thesis, as it concerns the attribution of competences and balance of power between Member States and the EU, that is, the frequent unwillingness of the former to transfer more decision-making competences to the supranational level or engage in new forms of 'hard' law coordination.

whereas the particulars are left to be determined by interinstitutional dynamics. For the most part, institutional change yielded by successive treaty amendments has not been so much the result of formal negotiations, but rather represents the sanctioning of established informal practices, like the use of interinstitutional agreements (IIAs).[83] Hence, quasi-formal and informal procedures may emerge around decision-making and even if influenced by the formal treaty environment, they are not fully determined by it, as they originate from and are enforced by the institutions themselves. In his study of EU decision-making, referring to committees, M. Van Schendelen maintains that 'the Treaties ... are not a reliable and valid indicator of the empirical reality of European decision-making'.[84] And the empirical reality of the evolving EU institutional practice is that, due to the openendedness of the treaties, the actual machinery of law-making may be *ad hoc* and unconstrained by formal rules.

The institutions frequently use all the political and legal means available to increase their impact on the decision-making process and to defend their prerogatives. This interinstitutional dynamic is enhanced by the lacunae character of the treaties which leaves much room for different interpretations of the institutional roles and the application of legislative procedures. Such was the case with codecision. While the procedure constitutionally enhanced the EP's legislative role *vis-à-vis* the Council and the Commission, its practical arrangements were the product of years of informal interactions between the institutions, formalised by the adoption of joint declarations on the practical arrangements regarding the operation of codecision. The 1999 Joint Declaration, unlike the 1993 Agreement it replaces, covers the whole procedure and, while it reflects the formal changes in interinstitutional relations stemming from the Amsterdam Treaty, it seeks to encourage rather than rigidly mandate the development of contacts at all stages between the institutions.[85] In the interest of

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[83] EP Report A4-0117/98 on improvements in the functioning of the institutions without modification of the Treaties-making EU policies more open and democratic. Rapporteur: Herman, PE225.909, 23.05.1998.

[84] M.Van Schendelen, 'The Council Decides: Does the Council Decide?', (1996) 34 JCMS 531-548.

[85] H.Farrell and A.Heritier, 'Formal and Informal Institutions under Codecision: Continuous Constitutional Building in Europe', EIoP 6/02. Joint Declaration on Practical arrangements for the New Codecision Procedure, 1999 OJC 148. EP Report A4-0206/99 on the Joint Declaration

better law-making,[86] the three institutions have further agreed on the general coordination of their preparatory and legislative work based on dialogue and appropriate procedures, including the provision by the Commission with clear and comprehensive justification for the legal basis used for each proposal. In the event of a change being made to the legal basis after any Commission proposal has been presented, the European Parliament is to be duly reconsulted by the institution concerned, in full compliance with the case-law of the Court of Justice.

As Amaryllis Verhoeven argues, the principle of institutional balance flows also from the duty of sincere cooperation to which EU institutions are bound and the rather widespread phenomenon of interinstitutional agreements underscores the importance of such balance as they are essentially about facilitating relations among the institutions and perfecting the equilibrium among the competing and evolving interests they represent.[87] The EP itself sees the conclusion of interinstitutional agreements, and not necessarily formal treaty amendments, the way to enhance its legislative role and reduce the democratic deficit caused by the absence of democratic (parliamentary) scrutiny of EU policy areas.[88] For instance, the 2002 Draft Intrinstitutional Agreement on access to Council sensitive documents is connected in its substance with Article 21 TEU, pursuant to which the Council Presidency consults Parliament on issues of foreign, security and defence policy and ensures that the latter's views are carefully taken into consideration.[89] The Parliament may substantially influence foreign policy through its exercise of budgetary control under the Interinstitutional Agreement

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on Practical arrangements for the New Codecision Procedure. Rapporteur: Manzella, PE230.581, 21.04.1999.

[86] EP, the Council and the Commission Interinstitutional Agreement on better law-making OJC 321/1, 31.12.2003.

[87] A.Verhoeven, *The EU in Search of a Democratic and Constitutional Theory*, Kluwer Law International, 2002, p.207.

[88] EP Report A4-0117/98 on improvements in the functioning of the institutions without modification of the Treaties-making EU policies more open and democratic. Rapporteur: Herman, PE225.909, 23.03.1998. EP Report A4-0158/99 on improvements in the functioning of the institutions without modification of the Treaties. Rapporteur: Herman, PE229.072, 26.03.1999.

[89] EP Report A5-0329/2002 on an Interinstitutional Agreement concerning access by the EP to sensitive information of the Council in the field of security and defence policy and on amendments to the Rules of Procedure. Rapporteur: Brok, PE313.404, 07.10.2002.

on provisions regarding the financing of the CFSP, as amended in 1999.[90] In this way, the Parliament's involvement in the conduct of foreign policy is more considerable than under its formal, treaty powers.

Moreover, actors like the Parliament with relatively little direct influence over formal treaty negotiations, may have an important indirect influence insofar as treaty changes reflect informal rules which they have bargained over.[91] When codecision was introduced (at Maastricht) and the Council opted to view the reforms as a 'cosmetic enhancement' to the EP's consultative role in law-making, the latter tried to attain institutional leverage by threatening to hamper the legislative process as much as possible. The institutional rankling culminated in the Directive on Voice Telephony in 1994, where the credible threat by the EP to vote against the Council's common position, if reintroduced, established the informal expectation that the Council would not seek to use its formal third reading ability to reintroduce a common position after conciliation had failed. This institutionalisation of informal relations led to the formal revision of codecision at Amsterdam.[92] Firstly, the Council's ability to reintroduce its common position was removed. Secondly, the possibility of early agreement between the Council and the EP was introduced.

In practice the institutions make use of a far broader range of soft law instruments. These may include resolutions and declarations, action programmes indicating a future course of conduct, decisions of the representatives of the Member States meeting in Council, guidelines issued by institutions as to how they will exercise their powers. Therefore, the use of soft law instruments directs the conduct of the EU institutions by providing a framework for the organisation of relations among themselves, which creates commitment on their part to

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[90] OJC 286/80, 22.9.97. It was subsequently replaced by the Interinstitutional Agreement of 6 May 1999 between the EP, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure, OJ C 172/1, 18.6.1999. On the basis of the preliminary draft budget established by the Commission, the Parliament and the Council shall annually secure an agreement on the amount of the operational CFSP expenditure, where the former will have the final word.

[91] J.Monar, 'Interinstitutional Agreements: The Phenomenon and its New Dynamic after Maastricht', (1994) 31 CMLR 693-719, p.695.

[92] ibid.

respect certain values[93] and expectations as to their position under Community law.

Despite the fact that they regulate institutional conduct during decision-making, the legal status of 'soft' law instruments is ambivalent, as they do not fall in one of the categories of Community legal acts mentioned in Article 249 EC. They are obviously 'acts' of the institutions and the treaties provide in a number of cases, like Article 218(1) EC, for special accords between the institutions. The legal situation has not changed much under the TeCE. The reclassification has been limited more or less to the same instruments that are already regulated in the EC Treaty, while there is only indirect reference to 'soft' law instruments. More precisely, Article I-33(2) provides that, when considering draft legislative acts, the EP and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure. On the other hand, in assessing appeals under Article 230 EC,[94] the Court has said that the system of Community acts is not closed and as to whether a particular act intends to produce legal effects, that is to be decided on the specific merits of that act. In the absence of 'inherent' legally binding force, an act can still be found to have 'incidental' legally binding force (if it affects the legal position of those concerned). It appears that under EC law a Community act may have legal effect, if it is capable of altering a person's legal rights and obligations.[95]

With particular reference to IIAs, the ECJ [96] has always acknowledged their legal authority as binding commitments between the institutions in the light of the principle of interinstitutional cooperation laid down in Article 10 EC, yet IIAs were dealt with officially only at Nice, where a Declaration was attached to the Treaty. It reiterates the Court's position that relations between the Community

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[93] On the First Action Programme, see 1973 OJC 112. The adoption of Action Programmes is now explicitly recognised in Article 130s(3) EC. Joint Declaration by the EP, the Council and the Commisssion on Human Rights, [1977] OJ C103/1 which commits the institutions to respect these rights. D.Chalmers, *EU Law: Law and EU Government. Vol.1*, Ashgate Publishing Group, 1998, p.161-2. L.Senden, *Soft Law in European Community Law*, Hart Publishing, 2004, p.498.

[94] Article 230 EC provides for the possibility of bringing an action for annulment of Community acts other than recommendations and opinions.

[95] See, for example, Case C-400/99 *Italy v Commission* [2001] ECRI-7303. L.Senden, op.cit. n.93, p.238.

[96] C-106/96 *UK v Commission* [1998] ECR I-2729.

institutions are to be governed by the duty to cooperate sincerely, but such agreements can neither change nor supplement the provisions of the Treaty and can only be concluded with the agreement of the three institutions (Council, Parliament and Commission). The Declaration itself has political rather than legal effect, but is intended as an institutional rebalancing measure attempting to put the three institutions on equal footing.[97] There is an attempt to settle the constitutional status of IIAs by the TeCE, Article III-397, where their binding nature is envisaged as part of interinstitutional cooperation.

The effect of 'soft' law instruments on the institutional balance is evident particularly in cases where the EC Treaty provides for the adoption of a Commission or Council recommendation, or leaves open the choice of instrument, whilst it prescribes a specific decision-making procedure (e.g. Article 175(3) EC prescribes the adoption of general action programmes according to the codecision procedure). In this context, illustrative of the tendency of the institutions to transgress their powers is the following quotation from the EP resolution relating to the Commission Communication on certain legal aspects concerning intra-EU investment (Golden Share): 'the content of the above-mentioned communication cannot be seen as binding, since the Commission clearly overstretched its powers by not discussing this important item of 'soft law' with the Council and the EP'.[98]

Another issue is the impact of 'soft' law on the Union's democratic legitimacy in terms of how their use affects the influence of citizens – and not just their representatives – on the decision-making process. 'Soft' law has been described as 'rules of conduct which find themselves on the legally non-binding level but which according to their drafters have to be accorded a legal scope'.[99] As already mentioned, any act, including 'soft' law instruments, may be found by the ECJ to have 'incidental' legally binding force, thus affecting the legal position of persons. Their obscure status raises doubts about their legal authority and

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[97] D.Galloway, op.cit n.37, p.159. SEC(2001)99, op.cit. n.28. Declaration on Article 10 TEC, annexed to the Treaty of Nice.
[98] L.Senden, op.cit. n.93, p.68. EP resolution B5-0249, 0250, 0255 and 0256/2001on the updating of certain legal aspects concerning intra EU investment, OJC 21 E/338, 24.1.2002.
[99] S.Douglas-Scott. op.cit. n.11, p.115. KC Wellens and GM Borchardt, 'Soft Law in EC Law', (1989) ELR 267-321, p.285.

punitive quality, their conformity to principles found in the treaties, let alone the substantive normative constraints which 'hard' law must comply with. As acts, they may produce legal effects but still bypass normal systems of accountability.[100] A stark example is the case of economic coordination among the euro-zone Member States (Eurogroup). While monetary policy is centralised and conducted by the European Central Bank (ECB) based on 'hard' rules that sanction non-compliance, Member States remain responsible for the conduct of their economic policies according to broad economic policy guidelines which have the legal status of recommendations. Such coordination uses informal working methods among ministers, where confidentiality is an integral part of their work. These informal circles of ministers which can have a considerable impact on decision-making and directly affect the life of citizens are difficult to control.[101] On the other hand a question arises, which will be explored in Chapter 6, as to what extent democratic legitimation of the decision-making process can come about through increased participation of the citizen in the process of policy preparation in an informal way through the use of 'soft' law.

While one would not necessarily question the necessity of 'soft' law instruments in terms of efficiency, their use may appear problematic in the light of the Union's commitment to the rule of law and democracy. Their proliferation is a point of concern as it is less clear what requirements actually apply to their adoption, how their use fits in with the formal, legally binding instruments and, last but not least, what rights and duties they create.[102] If their growing use is a sign of the essential place of 'soft' law in the decision-making system of the EU, the systematic failure to make their regime more visible is a disappointing feature of successive institutional reforms, especially in the context of hierarchy of instruments.

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[100] D.Trubek, P.Cottrell, and M.Nance, '"Soft Law", "Hard Law", and European Integration: Toward a Theory of Hybridity', JM WP02/05.
[101] U.Puetter, 'Informal Circles of Ministers: A Way out of the EU's Institutional Dilemmas?', (2003) 9 ELJ 109-124, pp.109-124 and 122.
[102] L.Senden , op.cit. n.93, pp.477-478 and 497.

3.4 The debate on transparency: simplified and open decision-making

The peculiarities of EU decision-making described so far, such as the complexity of the pillar structure, the proliferation of acts and instruments that can emanate from informal practices of the institutions (and other actors), the obscurity regarding the European Council's role and the Council's internal workings, raise real concerns about the existence of adequate and visible normative controls as to the rules regarding the particulars of decision-making and the limits of institutional activity. Opening up the legislative process is essential for democratic policy-making as citizens should have sufficient information about the objectives of legislation, as well as its process and the balance of the exercise of vested powers among the EU institutions. Therefore, it is regarded as essential to the democratic process that individuals are able to understand decision-making and the means by which decision-makers have reached their conclusions, in order to effectively evaluate policies and attribute responsibility.[103] According to the Court of First Instance (CFI), 'transparency... is essential to enable citizens to carry out genuine and efficient monitoring of the exercise of power vested in Community institutions.'[104] In short, lack of transparency impedes democratic control and oversight. As Juliet Lodge points out, [105] transparency and openness 'are frequently coupled together in EU parlance and are portrayed as synonymous'.

Transparency can be defined, on the one hand, as simple and clear procedures regarding the organisation and function of the institutions and the decision-making process and, on the other, as an open process of decision-making with effective public access to documents relating to such process. Seen in terms of

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[103] D.Curtin, 'Democracy, Transparency and Political Participation: Some Progress Post-Amsterdam', in *Openness and Transparency in the EU*, V.Deckmyn and I.Tomson (eds), European Institute of Public Administration, 1998, p.107. B.Bjurulf and O.Elgstrom, 'Negotiating Transparency: the Role of Institution', (2004) 42 JCMS 249-269, p.252.

[104] Case T-92/98 *Interporc v. Commission (InterporcII)* [1999] ECR II-3521, para.39. S.Douglas-Scott, op.cit. n.11, p.143.

[105] J.Lodge, 'Transparency and EU Governance: Balancing Openess and Security', (2003) 11 Journal of Contemporary European Studies 95-117, pp.95-6. See also, C.Moser, 'How open is "open as possible"? Three different approaches to transparency and openness in regulating access to EU documents', Reihe Politikwissenschaft 80/01. Study on Secrecy and Openness in the EU by Tony Bunyan, Statewatch, 1.10.02. Available at http://www.freedominfo.org; accessed on 4.10.02. A.Peters, 'European Democracy after the 2003 Convention', (2004) 41 CMLR 37-85, p.63.

democratic accountability, simplification indicates the intent to shape legislation in a more 'citizen-centred' manner to increase legitimacy through accessibility.[106] What actually simplification signifies is to be found in the Convention debates and recommendations. To simplify means 'to make comprehensible', but also to provide a guarantee that acts with the same legal or political force have the same foundation in terms of democratic legitimacy. Legislative procedures must therefore be reviewed to ensure that they respect this simple principle: acts which have the same nature and the same legal effect must be produced by the same democratic procedure. This will lead to a clearer hierarchy of legislation, which is the consequence of a better separation of powers, 'not with the aim of paying tribute to Montesquieu, but out of concern for democracy'.[107] A certain degree of complexity is inevitable purely from the fact that the EU is a multilayered and multisectoral political system, however, simplification of the Union's institutional framework was not genuinely considered as part of constitutional reforms. While the Treaty establishing the European Union, in 1993, acknowledged a need for 'consistency' of the Union activities (TEU, Article C, now 3), it retained the multitude of different instruments and different entities forming the Union. Ultimately, the need for simplification was expressed at the 1996 Turin European Council which called for the IGC 'to simplify the Treaties and to make the aims and the functioning of the Union more comprehensible to the citizen'.[108] Later, the Treaty of Amsterdam enshrined the term 'simplification' as the heading of its Part II (Articles 6-11 TEC).

Simplification was a constitutional reform topic at the Convention. The Working Group's report addressed separately the simplification of instruments, including the hierarchy of legislation and the simplification of legislative procedures. Consequently, one may find in the Constitutional Treaty a more simplified structure in terms of decision-making rules, a separation between legislative and implementing acts, not to mention the structural simplification of the treaties

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[106] R.Bieber and C.Amarelle, op.cit. n.48, p.220.
[107] CONV 424/02, Final report of Working Group IX on Simplification, 29.11.2002.
[108] Turin European Council Conclusions, Nr. SN100/1/96, 29.03.1996.

which will improve the comprehensibility of the system.[109] More precisely, the typology of acts is limited to six instruments: law, framework law, regulation, decision, recommendation and opinion. Article I-33 TeCE puts an end to the proliferation of acts which had progressively led to the use of more than fifteen, namely, the five basic acts in Article 249 TEC and numerous atypical acts such as resolutions, guidelines, etc. For the very first time, a distinction is made between legislative (Article I-34) and non-legislative (Article I-35) acts and, unlike the current treaties, each legal basis in the TeCE specifies the type of instrument which shall be used to implement it.

The commitment found in the Treaty for an 'ever closer Union', where decisions are to be taken as closely as possible to its citizens, placed the issue of 'public access' at the core of legislative activity. Transparency rules on access came first on the agenda in the early 1990s. A declaration annexed to the Maastricht Treaty linked transparency firmly to democratic government as it stated that the Conference considered that the transparency of the decision-making process would strengthen the democratic nature of the institutions and the public's confidence in the administration.[110] Following a series of 'soft' law measures reaffirming the commitment to open and democratic government as well as the adapting of the institutions' working practices to this effect, [111] in December 1993 the Council and the Commission adopted a common Code of Conduct on public access to documents which was implemented by way of decisions.[112] The aim pursued by the 1993 Council and the 1994 Commission Decisions was to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the

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[109] B.deWitte, op.cit. n.57, p.1255. CONV 424/02, op.cit. n.107. A.Peters, op.cit. n.105, p.65.
[110] Declaration No.17 on the right of access to information annexed tot ch Final Act of the Treaty on European Union, 7.2.92. C.Harlow, *Accountability in the EU*, OUP, 2002, p.37.
[111] Birmingham Declaration-A community close to citizens, 16.10.1992, Bulletin of the European Communities, No. 10-1992, p.9. Edinburgh European Council Conclusions on transparency and implementation of the Birmingham Declaration, 12.12.1992, Bulletin of the European Communities, No. 12-1992, pp.18-20. Copenhagen European Council Conclusions on access to information, 21-22.6.1993, Doc.180/1/93. Interistitutional Agreement between the EP, the Council and the Commission on democracy, transparency and subsidiarity, 25.10.1993, Bulletin of the European Communities, No. 10-1993, p.118-9.
[112] Code of Conduct concerning public access to documents, approved by the Council and the Commission, [1993] OJ L340/41. Decision 93/731 on public access to Council documents, [1993] OJ L340/43 and Decision 94/90 on public access to Commission documents, [1994] OJ L46/58.

institutions.[113] Any exception to that right of access must be interpreted and applied strictly.[114] The right of access does not apply to documents which do not exist.[115] A broad appreciation of the right of access to documents as a general principle seems to have emerged in the *Guardian*[116] case, where the newspaper requested access to COREPER preparatory documents, minutes, attendance and voting records as well as decisions taken by each Council (different formations). Such demand was rejected by the Council pursuant to Article 4(1) of the Decision on the basis of protecting the confidentiality of its proceedings. The CFI rejected the Council's position, ordered the release of documents, but stressed the necessity of counter-balancing the public interest to access to documents and the need to protect internal proceedings.

A new Regulation was adopted in May 2001, amid controversy, to implement the new Article 255 TEC with the aim, contrary to pre-existing rules, to establish a 'right' of public access to documents.[117] It begins by referring to the principle of taking decisions 'as openly as possible' and acknowledges openness as a means of enabling citizens to participate in decision-making and as a guarantor of democracy and legitimacy of the system (Recitals 1 and 2). The most important aspect of the Regulation is its broad purpose, scope and beneficiaries (Article

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[113] Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, para.66.
[114] Case C-41/00 *Interporc v Commission* [2003] ECR I-2125, para.48.
[115] T-311/00 *British American Tobacco (Investments) Ltd, v Commission* [2002] ECR II-2781, para.35.
[116] Case T-194/94 *John Carvel and Guardian Newspapers v Council* [1995] ECR II-2765. The same strict application of the 'right of access' is found in the Case T-105/95 *WWF v. Commission* [1997] ECR II-313, which is a challenge to the 1994 Commission Decision.
[117] During the preparation of a new regulation and contrary to the spirit of transparency and openness, the Council, in an apparent act of bad faith and in an unannounced move to meet NATO demands, made far-reaching changes to its 1993 Decision without consulting national parliaments and the EP. Such amendments were agreed at the meeting of COREPER, in July 2000, and later adopted by "written procedure". It did not only change the 1993 Decision but also overturned the Council Decision of December 1999 to the extent that it excluded from public access documents relating to the security and defence policy of the Union, military and civilian crisis management as well as any category of linked documents which 'enables conclusions to be drawn' regarding the existence of another classified document without the express permission in writing of the author. On the application by *Statewatch* for access to the amendments, the Council refused access on the ground of the undemocratic argument that the release 'could fuel public discussion on the subject'. Recital 4 of Regulation No.1049/2001 of the EP and of the Council of 30 May 2001 regarding public access to EP, Council and Commission documents, [2001] OJ L145/43, 31.05.2001. Council Decision 2000/23 on the improvement of information on the Council's legislative activities and the public register of Council documents, 6.12.99, [2000] OJ L9. 'Solana Decision': Council Decision 2000/527 of 14.6.00, [2000] OJ L212. *Essays for an Open Europe*, T.Bunyan, D.Curtin and A.White, European Federation of Journalists, November 2000. Available at http://www.statewatch.org/secret/essays.pdf; accessed 4.10.2002.

2(1)), while it applies to all documents that are in the institution's possession, no matter who the author, in all areas of activity of the EU (Article 3). As with the old legal regime, there are far-reaching exceptions[118] which are also consolidated, extended and divided into categories and sub-categories. To the CFI,[119] the Regulation establishes the principles, conditions and limitations governing the exercise of the right of public access to the documents of the Parliament, the Council and the Commission, in order to ensure that the administration acts with greater propriety, efficiency and responsibility vis-à-vis the citizens in a democratic system and to help strengthen the principles of democracy and respect for fundamental rights. Accordingly, the CFI has interpreted the right of access broadly,[120] but for the treatment of pleas based on an infringement of Article 4(5) which the Court has applied vigorously and has systematically evaded an assessment of the merits of a refusal to disclosure. For instance, in *Messina*,[121] it construed the Article in a manner consistent with Declaration No 35, annexed to the final act of Amsterdam, to enable a Member State to give its consent to disclosure where an application for access is made in relation to a document originating from that State. This interpretation is consistent with the wording of Article 4(5) of the Regulation, however the analogy with the Declaration is not. Neither is its interpretation in *IFWA* and *Scippacercola*[122] to the effect that any request for non-disclosure made by a Member State constitutes an instruction by which the institution is bound to comply.

Attitudes as to the extent to which citizens should be granted access to public documents vary widely from one jurisdiction to another. The case of *Svenska Journalistförbundet* illustrates the disparity in access afforded to the public between a Member State like Sweden and the EU, as well as the treatment of the

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[118] Recital 3, Articles 4, 9 and 18. Article 4 exceptions are designed to protect the following public interests: 1) public security; 2) defence and military matters; 3) international relations; 4) the financial, monetary and economic policy of the Community or a Member State; 5) the privacy and the integrity of the individual; 6) commercial interests, including intellectual property; 7) court proceedings and legal advice, and 8) inspections, investigations and audits.
[119] Case T-84/03, *Maurizio Turco v Council*, judgment of 23.11.2004, not yet reported, para.53.
[120] Case T-76/02, *Mara Messina* v *Commission* [2003] ECR II-3202. Case T-168/02, *IFAW* v *Commission*, judgment of 30.11.2004, not yet reported.
[121] Case T-76/02, ibid, para.41.
[122] Case T-187/03, *Isabella Scippacercola v Commission*, judgment of 17.03.2005, not yet reported, paras.58-60 and Case T-168/02, op.cit. n.120, para.57.

access right in different Member States.[123] Having said that, the issue is not whether the EU matches the transparency provisions found in the Member States. The many levels of government, the multiplicity of actors and procedures, the geographical autonomy or even insulation of the institutions and decision-making, the hardly existent European public space - at least one that resonates the protest and criticism often found in national systems[124] - mean that the onus on the EU is higher to provide for democratic control and oversight of its institutional system.

Transparency rules were formalised by their *de jure* incorporation in the Treaty of Amsterdam, allowing the ECJ to monitor their implementation. A 'norm' of legislative openness had, therefore, been formally acknowledged as an operational principle.[125] The new Article 1 TEU required that EU decisions be taken as openly as possible, whereas a new Article 255 TEC created a relatively limited right of access to the EP, Council and Commission documents, where general principles, limits and procedure were to be defined by legislation to be adopted under codecision. Greater transparency is recognised formally by the Constitutional Treaty as part of the democratic life of the Union (Title VI), but what appears more notable, as regards the functioning of the democratic process, is the novel principle of 'publicity' enshrined in Article I-50 TeCE,[126] that is, the general 'active' duty to legislate in public and to publish legislative material.

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[123] The Swedish authorities applied their citizens' right of access to information in respect of documents relating to EU activities more openly than the Council, as they granted access to 18 out of 20 documents requested. The Council did exactly the opposite. It further claimed that the release of the documents in Sweden constituted a breach of Community law. The Swedish and Dutch Governments supported the applicant's arguments as to admissibility. On the other hand, the UK Government shared the Council's view that the applicant's interest was general and political in nature, the intention being to ensure that the Council gave proper effect to its own Code of Conduct and Decision 93/731. The applicant could not derive any benefit from obtaining access to documents which were already in its possession. The applicant's insufficient interest in the outcome of the proceedings constituted an abuse of procedure. Case T-174/95, op.cit. n.113. W.Van Gerven, op.cit. n.47, p.225.

[124] C.Harlow, op.cit. n.110, p.33.

[125] D.Chryssochoou, 'Models of Democracy and the European Polity', CIVIC 1/2001.

[126] Under Articles I-50(3) and III-399 TeCE, the institutions will lay down in their rules of procedure the specific provisions for public access to documents. The right of access is also contained in the Charter, Article II-102 TeCE, Article and I-47(2) and Preamble in Part I, which do not expand the one already found in Article 255 EC apart from the fact that access to documents of agencies and bodies created by the legislator is now guaranteed at constitutional level., not only by secondary law.

As the Union's approach to transparency is not that of a standard international organisation, it needs to operate as a balancing act among different interests and attitudes. The debate between institutions and Member States on the text of Regulation 1049/2001 illustrates the vast differences in opinion on openness between and among the Member States and EU institutions.[127] As transparency is characteristic of a democratic system, democracy impersonates the need to strike a balance among the different objectives and rights. A certain degree of confidentiality is required, for instance, in the handling of sensitive documents relating to the security and defence policies of the Union. The *Olli Mattila*[128] case is very telling in this respect; the ECJ may have ruled in favour of Mr. Mattila who had been refused access to EU documents by the Council and the Commission, but in a separate case, Mr. Mattila was found guilty of espionage by the Finnish Supreme Court for passing confidential EU documents to Russian diplomats. And there are other considerations equally important for citizens like public interest,[129] or the protection of privacy and personal data that any EU-wide access right will have to take into account.

What can really affect the efficacy of transparency provisions is their application and interpretation by the EU institutions. For instance, there is lack of uniformity in the application of the exceptions found in Regulation 1049/2001 and the frequency with which the three institutions (EP, Council and Commission) invoke each exception as ground for refusal. The Council states protection of the public interest as regards international relations and public security as the main reasons for refusal, the EP is likely to refuse access to documents on grounds of protecting personal data, court proceedings and legal advice, while the Commission mainly invokes the protection of inspections, investigations and audits. Of the three, the Parliament is the most open. Moreover, the apparent discrepancy in applying exceptions is more a reflection of the divergent missions

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[127] Among the advocates of openness were the EP, the CFI, the European Ombudsman and some Member States, mainly the Nordic and the Netherlands. They demanded and finally obtained greater transparency, despite the efforts of those opposing transparency, such as the Commission, the Council, France, Germany, Italy and Spain. W.Van Gerven, op.cit. n.47, pp.227-8.

[128] C-353/01P, *Olli Mattila v Council and Commission* [2004] ECRI-1073.

[129] Joint Cases T-110/03, T-150-03 and T-405/03, *Jose Maria Sison v Council*, judgment of 26.04.2005, not yet reported.

and activities of the institutions, rather than a different interpretation of the provisions in the Regulation.[130]

Whether transparency will become an overarching EU principle depends also on the interpretation given to the exceptions to the 'access' right by the European Courts. In its judgment in the *Turco* case[131], the CFI reiterated that, according to settled case-law, such exceptions shall be interpreted and applied restrictively so as not to frustrate the application of the general principle of giving the public the widest possible access to documents held by the institutions. Yet, it rejected the applicant's claim that the exception in Article 4(2) covered only legal advice drawn up in the context of legal proceedings and not legal advice drafted in the course of the institutions' legislative activities. Following a complaint by the same applicant, the Ombudsman reached the opposite conclusion in one of his reports to Parliament, as he considered that the legal opinions in the case concerned raised questions in the framework of the legislative process and they should have become available to the public when the legislative process had reached a conclusion.[132]

Most notable is the interpretation of the Article 4(5) exception which, according to the CFI, lays down a *lex specialis* to govern the Member States' position. The power conferred on the Member States by Article 4(5) of the Regulation is explained by the fact that it is neither the object nor the effect of that regulation to amend national legislation on access to documents. Otherwise, the obligation

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[130] COM(2005) 348, Report from the Commission on the application in 2004 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents Brussels, 29.07.2005. COM(2003) 216, Report from the Commission on the application in 2002 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents Brussels, 29.4.2003. Annual report of the Council on access to documents – 2003, April 2004 available from http://ue.eu.int/cms3_applications/showPage.ASP?id=305&lang=en&mode=g. See COM(2004) 45, Report of the Commission on the application of the principles of the Regulation (EC) n° 1049/2001 relative to the access of the public to documents of the European Parliament, the Council and the Commission, 30.01.2004, p.16.

[131] The applicant contested the Council's refusal to grant him access to an opinion of its Legal Service on a proposal for a Council Directive laying down minimum standards for the reception of applicants for asylum in Member States: Case T-84/03, op.cit. n.119, paras.59 et seq. This judgment was subsequently appealed, and is currently the subject of cases C-39/05 P (*Kingdom of Sweden v. Council*) and C-52/05 P (*Maurizio Turco vs. Council*).

[132] Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 1542/2000/(PB)SM.

imposed on the institution to obtain a Member State's prior agreement would risk becoming a dead letter. if the institution were able to decide to disclose that document despite an explicit request not to do so from the Member State concerned.[133] At the same time, the Court adopted a very lax approach when it considered the authority of the source of the document requesting non-disclosure, as the competence of the author was to be decided by national law. To the CFI, the EU institution does not have to determine whether a document requesting non-disclosure is simply forwarded and not drafted by the Member State; it is still covered by the Article 4(5) exception.[134] Potentially, any third party may circumvent its obligations under Regulation No 1049/2001 simply by asking a Member State to forward a document requesting non-disclosure. The practical effects of the CFI's claim in *Scippacercola*[135] that it is for the national administrative and judicial authorities to assess, on the basis of their national legislation, whether access to the documents originating from a Member State must be granted and to determine whether, and to what extent, there is a right of appeal for the parties concerned would be to introduce a 'veto right' for the Member States, despite the Court rejecting such argument in the case. The wider implications of the CFI's interpretation of the Article 4(5) exception would be that citizens' access rights under EU legislation may be compromised by stringent national rules. Citizens may also be forced to direct applications for access to EU documents to Member States. Most importantly, the fact that, according to the CFI,[136] a Member State is under no obligation to state the reasons for any request for non-disclosure means that it has to satisfy a lesser standard than the EU institutions under EU law. That is, the obligation on the part of the institution to handle a request promptly and with diligence and

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[133] Case T-168/02, op.cit. n.120, paras.57-8. Case T-76/02, op.cit. n.120, paras.40-41.
[134] For instance, in Case T-187/03, op.cit. n.122, paras.37-8 and 40, a cost benefit analysis was carried out by a bank on behalf of the Greek national authorities. The CFI said that the EU institution did not have to determine whether documents were simply forwarded (and not drafted) by the Member State; they were still covered by the Article 4(5) exception. In Case T-76/02, op.cit. n.120, paras.46 and 48, the CFI said it was not for the Commission to determine the competence of the author of the letter of 16 May 2002 to raise an objection under Article 4(5) to the disclosure of the documents requested by the applicant; it was required only to verify whether the letter in question was, prima facie, that of a Member State.
[135] Case T-187/03, ibid, para.59.
[136] Case T-187/03, ibid, para.58. Case T-168/02, op.cit. n.120, para.59.

provide the reasons for refusal.[137] That will cause a chaotic application of the rule throughout the EU and casts doubt on the protection of transparency as an overarching EU principle.

3.5 Conclusion

This chapter has attempted to provide an initial assessment of the EU decision-making process. What has become apparent is that, under the current constitutional framework (Treaty of Nice), the rules governing decision-making and the relations between the institutions therein are not always constant and clearly defined, rendering the legislative process quite complex and non-transparent at times. The application of different principles across the Union pillars, the varying and ambiguous voting rules, institutional roles and multiple avenues of influence, create uncertainty and unpredictability as to the actual boundaries of exercise of power by the EU institutions. The evolving nature of the Union's institutional structure is not always reflected in formal constitutional amendments nor is subject to normative controls. Satisfactory constitutional control is not necessarily synonymous with inclusion within the treaty framework, but the absence of observable norms or standards governing institutional practice[138] and the increasing difficulty in identifying which institutions are politically responsible for decisions hinder, rather than facilitate, citizen understanding of the EU system. Even if there are still safeguards in informal institutional practice and channels of cooperation, such checks and balances on their own only deliver controlled government not *publicly* controlled government.

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[137] For instance, Article 7 of the Regulation 1049/2001 as well as established case law. For instance, Case T-188/98 *Kuijer* v *Council* [2000] ECR II-1959, para.38, Case T-14/98 *Hautala v Council* [1999] ECR II-2489, para.67 and Case T-2/03, *VKI v Commission*, judgment of 13.04.2005, para.69.

[138] G.deBurca, op.cit. n.8, pp.56-7.

The evidence of institutional asymmetry in treaty provisions, which promote a legislative and executive role primarily for the Council, raise questions about the presence, or absence, of essential structural guarantees of democracy in the EU legislative process. This is because the Council has been criticised in particular over the extent to which its organisation and operation comply with notions of democratic legitimacy. How, unlike the other two institutions (EP and Commission), voting in the Council is much complicated, exacerbated by the pillar structure of the Union, the plethora of instruments to be adopted, the role of the European Council.[139] On this note, there is an increasing hijacking of policy generating by the European Council, a non-representative and thus unaccountable institution, whose increasing dominance may be seen to take over roles traditional held by other EU institutions, in this case, agenda-setting by the Commission.

As analysed in the different sections of this chapter, the Constitutional Treaty has made a conscious and at times considerable effort to address the perceived shortcomings of the Union's decision-making as a whole regarding its simplification and streamlining, but left intact fundamental aspects of the institutional system. For example, it avoided any demonstrable and compelling innovation regarding the day to day workings of the Council by refusing to create a separate legislative Council that would have rendered it more visible and comprehensible as an institution and its workings more transparent. Most notably, the TeCE formalised, and thus enhanced, the institutional role of the European Council in decision making, although not in strictly legislative terms, without any accompanied attempts to make it accountable. Shouldn't a constitutional document, that was negotiated on the strength of the perceived need that any reforms should enhance the democratic legitimacy of the Union, institutionally design a system that would be directly answerable to the people? The following chapter will examine the parliamentary aspect of the institutional system of the Union that is intended to do just that, namely, to be directly answerable to European citizens, by focusing on the role of the European

[139] F.Hayes-Renshaw, 'The Role of the Council', in *The European Union: how democratic is it?* S.Andersen and K.A.Eliassen (eds), Sage Publications Ltd, 1995, p.147. W.V.Gerven, op.cit. n.47, p.282.

Parliament and its actual ability to better address issues of democracy in the complex legislative environment, that of the EU.

CHAPTER 4

THE EUROPEAN PARLIAMENT AS 'REPOSITORY' OF DEMOCRATIC LEGITIMACY

4.1 Introduction

All Member States have in common a system of representative democracy where parliaments are regarded as pillars of democracy, be it parliamentary democracy, as in most of them, or a form of presidential democracy with restricted, though essential, parliamentary functions, as in France. In effect, by embodying popular sovereignty, parliaments act as gatekeepers of the political process.[1] The parliamentary system is not only the dominant form of governance in Western Europe, it also happens to be the standard reference in reflections on the institutional architecture of the European Union,[2] especially since it has evolved into a polity process. Although the Community was conceived within parliamentary traditions, the treaties have been criticised for failing to follow that tradition. The democratic deficit in the EU decision-making process has been attributed over the years partly to the minimal legislative role of a directly elected, supranational institution, the European Parliament.

The widespread perception of the EP as an 'anchor of democracy' is deeply rooted in the constitutional traditions of the Member States and to the belief that voting is the central mechanism for political decision-making. The premise of this approach rests on the assumption that the Parliament is able to claim legitimacy through the democratic participation of the electorate.[3] That the

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[1] J.Gerkrath, 'Representation of Citizens by the EP', (2005) 1 EuConst 73-78, p.73. G.Ress, 'Democratic Decision-Making in the EU and the Role of the EP', in *Institutional Dynamics of European Integration*, D.Curtin and T.Heukels (eds), Martinus Nijhoff Publishers, 1994, pp.154 and 158. B.Crum, 'Tailoring Representative Democracy to the EU: Does the European Constitution Reduce the Democratic Deficit?', (2005) 11 ELJ 452-467, pp.455-6.

[2] R.Dehousse, 'European Institutional Architecture After Amsterdam: Parliamentary System or Regulatory Structure?', (1998) 35 CMLR, 595-627, p.598.

[3] D.Obradovic, 'Policy Legitimacy and the EU', (1996) 34 JCMS 191-222, p.202.

enhancement of its institutional role would compensate for the transfer of sovereignty from national parliaments to supranational institutions. However, the claim that the accountability issue in the Union decision-making should be pursued through increased parliamentary participation presupposes an undisputed legitimising capacity for the Parliament and acknowledges the institution as the main bearer of democratic legitimacy. The EP is misconceived as the EU equivalent to a national legislature.

The chapter will explore the EP's role in the EU legislative process in two separate contexts. Firstly, its position in the institutional balance which is traditionally perceived as a system of checks and balances that seeks to achieve equilibrium in the exercise of legislative functions. The emphasis will be placed on codecision and executive supervision and their constitutional significance in attaining a strong institutional role for the EP in the institutional triangle (its relationship with the Council and the Commission). Secondly, its place in the institutional reality of the EU where each institution is to represent a constituency and institutional balance – in the contemporary, political sense – could be achieved by ensuring adequate representation. Whether, in this context, the EP can fare as a truly representative actor will depend on its ability to appropriately address two main issues of democracy: representation and equality. The ultimate aim is to establish whether the democratic content of decision-making at EU level can be reduced to the degree to which the Parliament has a say.

4.2 Parliamentary participation in the legislative process: the constitutional significance of codecision

The conviction, shared in western democracies, that a democratic process entails, *inter alia*, the right to vote for representative institutions and that these institutions shape decision-making through powers of (co)decision,[4] has influenced institutional practice in the EU to partly evolve towards the 'parliamentary' model of representative democracy. Participation in the Community's legislative process is one of the duties of the EP envisaged in the Treaty,[5] a body of full-time elected representatives at the heart of decision-making in Brussels. The extent of such participation has been the subject of successive intergovernmental reforms. Under Maastricht, the EP 'was perhaps the largest net beneficiary of the institutional changes in the Treaty'.[6] Its evolving institutional role in law-making is epitomised in its power of codecision. As Renaud Dehousse remarks,[7] the introduction of the codecision procedure marked Parliament's accession to the role of colegislator. The Amsterdam reforms went a step further along the same path both in qualitative and quantitative terms;[8] they put the Parliament and the Council on equal footing in decision-making and extended the procedure to a significant number of new areas.

At Nice, the extension of codecision was tied with provisions that changed over from unanimity to QMV, but not with legislative measures that already came

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[4] L.Senden, *Soft Law in European Community Law*, Hart Publishing, 2004, p.66.
[5] Article 192 TEC, Article I-20 TeCE.
[6] A.Maurer, 'The Legislative Powers and Impact of the EP', (2003) 41 JCMS 227-247, p.227.
[7] R.Dehousse, op.cit. n.2, p.605. This is largely true for the policy areas that traditionally fall under the first pillar.
[8] A new development introduced by Amsterdam was that agreement could be reached at first reading either by the Council accepting the EP's amendments or by the Parliament accepting the Council's common position. Yet, the essence of the codecision procedure is summed up in a single sentence; if after two readings each, the Council and the Parliament have not reached an agreement on the text, the matter is referred to a Conciliation Committee – composed of equal members from each side and attended by the Commission – which has the task of negotiating a compromise text to be submitted to the Council and the Parliament for final approval. If the Conciliation Committee fails to reach an agreement within the prescribed period, the text automatically fails and cannot become law. This is a significant improvement to the Parliament's legislative position as compared to the Maastricht provisions where, if under conciliation no agreement could be reached, the Council could adopt a text unilaterally, unless unanimously rejected by the EP. This has redressed Parliament's position from a subordinate role of 'blocking' to one of 'making' legislation and with it the negative quality of such intervention (blocking).

under QMV.[9] The Progress Report on the 2000 IGC[10] proposed an amendment to Article 251 EC that would acknowledge codecision as the standard procedure for the adoption of general legislation, but the Nice European Council failed to reach agreement so as to include it in the approved text of the Treaty. The EP emerged as a 'winner' from the Constitutional Convention.[11] It is said to jointly enact legislation with the Council (Articles I-19(1) and 23(1)). The codecision procedure is deemed to be the ordinary legislative procedure for the making of European laws and framework laws (Article I-34(1)), whose reach has been extended to cover more policy areas, including agriculture and fisheries, asylum and immigration law.

The EP has succeeded in transforming its constitutional position as a significant player in shaping legislation, as part of a two-chamber legislature in which the Council represents the states and the EP the citizens. Therefore, codecision is significant in constitutional terms to the institutional balance, as it offers the EP a real partnership with the Council in shaping the measure finally adopted, a real power to say 'yes' and 'no' to legislation with decisive effect over the bulk of EU legislation.[12] How did the EP manage to secure these changes? Unlike most national parliaments, the EP has not regarded itself as part of a finished

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[9] These include: Article 13 EC, incentives to combat discrimination; Article 65 EC, judicial cooperation in civil matters; Article 157 EC, specific industrial support measures; Article 159 EC, economic and social cohesion actions outside the Structural Funds; Article 191 EC, the statute for European political parties. In the case of visas, asylum and immigration policy, under Articles 62 and 63 EC, the move to QMV and to codecision is partial and deferred for a later date. EP Report A4-0102/95 on the functioning of the TEU with a view to the 1996 IGC-Assessment of the Reflection Group's work. Rapporteur: Bourlanges and Martin, PE 190.440, 4.5.1995.

[10] The introductory sentence appeared as follows: 'Acts adopted pursuant to the procedure prescribed below shall define the objectives to be attained and the essential elements of the measures to be taken, save where special provisions of this Treaty or the nature of those measures so justify': CONFER 4790/00, Progress Report on IGC on Institutional Reform, 3.11.00. A.Dashwood, 'The Constitution of the EU after Nice', (2001) 26 ELRev 215-238, pp.220-1.

[11] P.Craig, 'Institutional Structure: A Delicate Balance', (2005)1 EuConst 52–56, p.53.

[12] However, codecision preserves intact the exclusive institutional right of the Commission to initiate legislation and, to that extent, it maintains unchanged the institutional balance. This means that it falls on the Commission to decide whether the Community should act and, if so, on what legal basis which in turn determines the type of decision-making procedure to be followed. It also decides what content and what provisions the proposal should contain as regards further implementation. Article 192 EC and Article I-26(2) TeCE.

institutional system, but rather as part of one requiring evolution or even transformation and to which goal it has always sought to act as a catalyst.[13]

Yet, the real impact of codecision can only be assessed by the Parliament's actual capacity to influence the legislative outcome. It is generally accepted that the co-decision procedure has worked well. Since the entry into force of the Treaty of Maastricht, in 1993, the number of legislative dossiers processed under codecision increased significantly and were mostly concluded at second reading.[14] Also, since its introduction, only very few procedures failed with particular reference to the proposals for Directives on the patenting of biotechnological inventions,[15] on voice telephony,[16] on establishing a securities committee,[17] on takeover bids[18] and on the patentability of computer implemented inventions.[19] The EP's veto threat may either force the Commission to modify its original proposal subsequently adopted by the Council ('voice telephony') or may entice the Council to overcome its inflexibility over

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[13] A.Dashwood, 'Issues of Decision-making in the EU after Nice', in *Accountability and Legitimacy in the EU*, A.Arnull and D.Wincott (eds), OUP, 2002, pp.36-7. European Parliament, Activity Report of the delegations to the Conciliation Committee, 1 November 1993 to 30 April 1999. Rapporteurs: Fontaine, Imbeni and Aldea, PE230.998; Activity Report of the delegations to the Conciliation Committee, 1 August 2001 to 31 July 2002. Rapporteurs: Dimitrakopoulos, Cederschiold and Imbeni, PE287.614. R.Corbett, F.Jacobs and M.Shackleton, 'The EP at Fifty: A View from the Inside', (2003) 41 JCMS 353-373, pp.354-5 and 359.

[14] During the last five years since Amsterdam came into force, there were 403 codecision procedures successfully concluded and 86 sets of conciliation negotiations in this parliamentary term. European Parliament, Activity Report of the delegations to the Conciliation Committee, 1 May 1999 to April 2004. Rapporteurs: Dimitrakopoulos, Cederschiold and Imbeni, PE287.644.

[15] The parliamentary delegation reached agreement with the Council during conciliation, but was subsequently rejected by the MEPs (March 1995). However, on the same subject in May 1998, the Parliament approved the Council's common position, which had taken on board 65 out of its 66 amendments. Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions, OJL 213/13, 30.7.98.

[16] The proposal to apply open network provision to voice telephony services, after failure to agree on a joint text, the Council confirmed its common position. Subsequently, this was rejected by the European Parliament in July, 1994. It is worth noting that the Commission has since reintroduced a proposal, and a compromise agreement was reached on the seventeen amendments adopted by the Parliament at second reading. Directive 98/10/EC of the European Parliament and of the Council on the application of open network provisions (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, OJL 101, 1.4.98.

[17] On a proposal for a directive, the Council did not propose to affirm its common position, anticipating the changes put forward by the Treaty of Amsterdam (in May 1998). The proposed act was deemed not to have been adopted: COD 95/ 0188.

[18] The joint text agreed in conciliation was rejected after a tied plenary vote in July 2001, pursuant to Rule 128 EP's Rules of Procedure. European Parliament, Activity Report of the delegations to the Conciliation Committee, 1 August 2000 to 31 July 2001. Rapporteurs: Imbeni, Provam and Friedrich, PE287.593.

[19] COD/2002/0047, Proposal for a Directive of the EP and of the Council on the patentability of computer based inventions. For the first time, the Parliament has rejected a piece of legislation by absolute majority in the second reading.

parliamentary amendments ('takeover bids'). There is also an ever-increasing trend for legislative texts to be adopted on the basis of a compromise between the Parliament and the Council in Conciliation.[20] It is difficult to say whether the quality of legislative output has improved under codecision. Such amendments may not always be sufficient or necessary as their weight may be debatable. Parliament's wishes are often accommodated by making changes to the recital of a proposed act, as in the case of the Directive on biotechnological interventions. Although these are useful for interpretative purposes, their legal effect is indirect.[21] The joint text on the pursuit of television broadcasting activities[22] shows that difficult conciliation cases have resulted in the adoption of 'package' compromises, accompanied by declarations and statements whose legal status is questionable.[23]

Parliament's legislative influence is contingent on a number of institutional factors: different voting rules, the peculiar, 'sectorised' structure of the Council as well as interinstitutional relations. The opportunity available to the Parliament to press amendments through conciliation often depends on the favourable, or unfavourable, stance of the Council Presidency. In the 'auto-oil' package, Parliament clashed with Council over the two auto-oil proposals, by insisting on setting mandatory fuel quality and vehicle emission limits for 2005. Both the Council and the Commission had agreed for indicative targets to be set initially, with legal standards to be set at a later stage, while Parliament remained adamant

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[20] Of the 1344 amendments adopted by Parliament at second reading: 307 were agreed in conciliation as they stood, i.e. 23%; 809 were agreed on the basis of a compromise, i.e. 60%; 228 amendments were withdrawn during the conciliation procedure, i.e.17%. Activity Report PE287.644, op.cit. n.14.

[21] Legal protection of biotechnological interventions (COD0159/94)-delegation chairman: Fontain. Rapporteur: Rotley. Legal Affairs Committee, 1995. S.Boyron, 'The codecision procedure: Rethinking the constitutional fundamentals', in *Law-Making in the EU*, C.Harlow and P.Craig (eds), Kluwer Law International, 1998, p.148.

[22] The joint text adopted in conciliation did not contain two major EP amendments. Report on the joint text on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (C4-0203/97-95/00074(COD)). Rapporteurs: Quecedo and Hoppenstedt, A4-0201/97, 3.6.97.

[23] The ECJ has decided that such declarations have no legal effect unless reference is made to its content in the text of the act: Case C-292/89 *ex parte Antonissen* [1991] ECR I-745.S.Boyron, ibid, p.153. As Earnshaw and Judge explain, it is not possible to distinguish between 'substantive' amendments designed to be accepted and 'propagandistic' amendments designed to advance an issue up the policy agenda of the Council and the Commission without any realistic expectation of inclusion in the final directive. D.Earnshaw and D.Judge, 'From co-operation to co-decision: The EP's path to legislative power', in *EU: Power and Policy-Making*, J.Richardson (ed), Routledge, 1998, p.102.

to its position and the convening of the Conciliation Committee became inevitable.[24] The EP found itself facing a British Presidency with plans to make the environment its priority. Foreign Secretary Robin Cook reaffirmed in a wide-ranging address to MEPs the determination of the New Labour government's commitment to strengthen relations with the European Parliament.[25] In that climate, a deal on a package of binding measures to reduce pollution from car emissions from 2000 and improve fuel quality was agreed by the conciliation procedure just before the end of the British Presidency.

The different voting rules in Council and their linkage to codecision may place Parliament in a disadvantageous position, having to make more compromises in the effort to agree on a joint text. The requirement of unanimity diminishes the merit of the codecision procedure, because Council's attitude towards Parliament becomes inflexible and is likely to increase the risk of stalemate, particularly during the conciliation process.[26] But, ultimately, the EP does not simply propose amendments; it screens draft legislation at every stage of the procedure and, jointly with the Council, determines the final content of a legislative proposal. When it comes to the essence of legislative (and budgetary) work, MEPs shape legislation in a way that members of many national parliaments do not. It is usually headline news, if a national parliament amends a bill against the will of the government; when a government publishes a bill, it is usually clear what will come out of the procedure. This is not the case in the European Parliament. A draft legislative act is really a draft, subject to examination and amendments.

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[24] "The EP's Determined Stance on Auto-Oil" - EC Inform-Transport No 13/5, February 1998.

[25] Directive 98/69/EC of the European Parliament and of the Council relating to measures to be taken against air pollution by emissions from motor vehicles and amending Council Directive 70/220/EEC; Directive 98/70/EC of the European Parliament and of the Council relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC, OJ L 350/1, 350/58, 28.12.1998. *EP News* 1, January 1998 and *EP News* 4, February 1998.

[26] For instance, in the decision establishing a support programme in the field of books and reading, including translation (Ariane), the conciliation phase had been deadlocked for a number of months. Actually, the first meeting of the Conciliation Committee was cancelled at the last minute, because of lack of agreement in the Council, due to the unanimity requirement. Eventually, the procedure was concluded and all substantive parliamentary amendments were accepted by the Council. The negotiations on the financial framework proved to be particularly difficult, as the programme was based on Article 151 of the Treaty, which required the Council to act unanimously. Due to this requirement, a small number of Member States was in a position to block a possible compromise in Council. It became obvious that the need for unanimity in the Council conflicted with the spirit of conciliation. EP Report A4-0237/97 on a European Parliament and Council Decision establishing a support programme, including translation, in the field of books and reading (Ariane). Rapporteur: Mouskouri, PE222/102, 03.07.97.

And if the act goes into conciliation, ultimately the positions of the two institutions, the Council and the EP, must be reconciled.[27]

4.3 The EP: a vehicle for citizen representation at EU level?

Although the principle of political equality is one of the founding norms of modern democracies, it is difficult to apply such a simplistic equality principle to the EU, a polity of both states and peoples.[28] Yet, as identified in Chapter 2, if the EU is to be regarded a democratic system, it needs to provide all citizens with the opportunity to participate equally in the political life of the polity. The European Parliament is the only supranational institution directly elected by universal suffrage, consisting of 'representatives of the peoples of the States brought together in the Community'.[29] The Constitutional Treaty introduces new significance to the Parliament's representative quality: it 'shall be composed of representatives of the Union's citizens'. Replacing the plurality of distinct peoples by a more generic reference to the Union's citizens considered as one, more or less, homogenous group, clearly intends to strengthen the linkage between the EP and its electorate.[30] It also seems to be a logical consequence of the establishment of the Union's citizenship with the right to vote and to stand as

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[27] R.Corbett, F.Jacobs and M.Shackleton, op.cit. n.13, p.358.

[28] As Stephan Collignon observes, the main distinction between the modern-individualist norm of equality is 'one (wo)man, one man vote' and the holistic-communitarian norm is that 'all communities are equal'. In the EU voting does not follow these pure principles. In the Council the votes are weighted to reflect the size of countries, in the EP not all members represent the same number of citizens. Political equality implies that every country's voting rights would represent its population share. This in not the case in the EU. The EU has a bias in favour of smaller Member States. S.Collignon, *The European Republic – Reflections on the Political Economy of a Future Constitution*, The Federal Trust, 2003, pp.151-2.

[29] Article 189 TEC. Article I-20 TeCE provides that the EP represents the 'citizens' of the Union.

[30] See Articles I-1, I-46, and I-20(2). J.Gerkrath, op.cit. n.1, pp.74-5. The French *Conseil Constitutionnel* recently took a position that sustains the angle adopted by Article I-19. In a decision from 3 April 2003, it held that the building of constituencies for the elections of the members of the European Parliament in France was not contrary to the principles of indivisibility of the Republic and unity of the French people. Remarkably enough, it considers the French MEPs as elected 'representatives of the citizens of the European Union residing in France'. The German *Bundesverfassungsgericht* also recognises the potential function of Union citizenship, defining it as 'the legal expression of the essential connection among nationals of all Member States granting a legally binding expression to the existing amount of community'.

a candidate to EP elections, the establishment of political parties and a process of direct universal suffrage. And although universal suffrage was not foreseen in the original treaties, in the mid to late 70s direct elections were acknowledged as a means of bestowing the EP with 'a new political authority' that would 'reinforce the democratic legitimacy of the whole European institutional apparatus'.[31] Therefore, the obvious starting point is the recognition that the Parliament constitutes the representative – democratic element *par excellence* in the Union's institutional structure. A principal dilemma is to what extent and on what basis citizens can influence the formation of EU policies that directly affect their lives.

The representation system, as envisaged in the Treaty, aims to 'ensure appropriate representation of the peoples of the States brought together in the Community'.[32] Despite the explicit reference to 'appropriate representation' of the peoples, the current system of seat distribution gives disproportionate representation in favour of the smaller Member States. It had been decided at Nice to increase on a *pro rata* basis the number of MEPs to be elected to reach a total of 732 for the 2004 European elections, but also substantially reallocate seats in the Parliament following enlargement in the form of a decrease.[33] Article I-20 TeCE maintains the standard of representation, which is said to be 'degressively proportional'.[34] This formula is not novel, but simply describes the existing system as the number of citizens represented by each elected representative depends on the overall size of a Member State's population and still provides disproportionate representation in favour of the smaller Member States. The system leads inevitably to distortion in representation as citizens are set to be represented differently, according to their country of residence.[35] Articles I-20 appears at odds with Article I-44 which proclaims that 'in all its

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[31] The 1975 Tindemans Report in J.Blondel, R.Sinnott and P.Svensson, *People and Parliament in the European Union*, Clarendon Press, 1998, pp.4 and 10.
[32] Article 190 (1) EC.
[33] The Parliament did not object to the ceiling. SEC(2001)99, Memorandum to the Members of the Commission, Brussels, 18.01.01. Article 190(2) EC. Article 2 of the Protocol on the Enlargement of the EU, Annexed to the Treaty of Nice. EP Report A-5-0086/2000 on the EP's proposals for the Intergovernmental Conference. Rapporteurs: Dimitrakopoulos and Leinen, 27.03.00.
[34] Maximum of 750 MEPs, seats divided by degressive proportionality: minimum threshold of six and maximum threshold of ninety six members by Member State.
[35] J.Gerkrath, op.cit. n.1, p.76.

activities the Union shall observe the principle of democratic equality of its citizens'.

Although the EP, as the only directly elected institution of the EU, has often been accorded prominence in discussions of democracy and representation within the EU, relatively little attention has been paid to the attitudes of its members and the practice of representation in the EU. There has been growing criticism that the Parliament fails to provide an effective representative link between European citizens and the Union.[36] The question arises whether it is the individual MEPs or the European parties that act as 'representative agents' in the EU. Both Article 4 of the 1976 Act on EP elections and Rule 2 of the Parliament's Rules of Procedure declare the MEPs' ideological independence when voting in plenary. Studies have shown that MEPs are strongly more pro-integrationist than most of their constituents, whereas when it comes to specific policy areas, like common border controls and the single currency, the congruence between the electorate and their elected representatives is remarkably poor. As for European parties, their organisation into political groupings is either based on permanent, but rather loose party coalitions,[37] or often task-specific and technical with no specific ideology to such an extent that even the Parliament has challenged their legitimacy. As a result, the EP has adopted an interpretation of Rule 29(1) of its Procedures – an act which was accepted by the Court of Justice - as regards the exercise of electoral mandate to the effect that political affiliations are a mandatory requirement under the Rule. The dual requirement for MEPs of sharing political affinities and coming from more than one Member States when organised into political groups was seen as the expression of the objective found in Article 191 EC. Namely, contributing to forming a European awareness and to

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[36] R.Scully and D.M.Farrell, 'MEPs as Representatives: Individual and Institutional Roles', (2003) 41 JCMS 269-288, p.269.

[37] 1976 Act concerning the election of the representatives of the European Parliament by Direct Universal Suffrage, (1976) OJL 278. See, for instance, the results of the *European Representation Study 1994-1997* as discussed in H.Schmitt and J.Thomassen, 'Dynamic Representation: The Case of European Integration', Mannheimer Zentrum fuer Europaeische Sozialforschung, Arbeitspapier 21/00 and H.Schmitt and J.Thomassen (eds), *Political Representation and Legitimacy in the European Union*, OUP, 1999, chapters 9 and 12. P.Dann, 'Looking through the Federal Lens. The Semi-parliamentary Democracy of the EU', JMWP 5/02.

expressing the political will of the citizens of the Union.[38] Nonetheless, the parliamentary rejection in plenary of the joint text on 'takeover bids' agreed in conciliation, in July 2001, portrays the salience of national factors in decision-making within the Parliament. MEP voting intentions were subject to scrutiny and lobbying not only by those whose interests were affected but also by national governments, especially after Germany withdrew its support to the Council common position. So, a primary determinant that led to the rejection of the Directive was nationality and not party grouping.[39]

Since Maastricht, the Treaty - Article 191 (ex138a) EC - has formally acknowledged the role of European political parties (Euro-parties) in the formation of a European awareness and in the expression of the political will of the citizens of the Union. Indeed, political parties may be regarded as a functional prerequisite for a democratic process. The reason being, they are central to political life as they politically mobilise voters by providing ideologies, platforms and programmes.[40] Euro-politicians[41] also seem to think that the democratic deficit should be remedied through 'partyfication' and a 'politically vibrant' EU, where political parties will 'have to organise themselves so that they can articulate across Europe the will of the section of the population they represent'. Although there is express reference to the 'political will' of the citizens, curiously enough, one does not find any direct reference to democracy or other political values at least not until the text of the Constitutional Treaty, where political parties have become part of 'the democratic life of the Union'(Article I-46(4)). Even then, provisions on Euro-parties have no more than declaratory status with no operational implications.[42] To assess the quality of

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[38] Joint Cases T-222/99, T-327/99 and T-329/99 *Martinez v. European Parliament*, [2001] ECRII-2823.

[39] D.Judge and D.Earnshaw, *The European Parliament*, Palgrave, 2003, pp.264-5.

[40] M.Pedersen, 'Euro-parties and European Parties: New Arenas, New Challenges and New Strategies', in *The EU: how democratic is it?*, S.Andersen and K.Eliassen (eds), London, 1996, p.15.

[41] Opinion expressed by Thomas Jansen, general secretary of the European People's' Party: Thomas Jansen, *The European People's Party*, Macmillan, 1998, p.177. K.Heidar, 'Parties and Cleavages in the European Political Space', Arena WP 03/7.

[42] The obscure Article 191 EC provides only a hypothesis about the possible long-term effects of the creation of parties at supranational level as it is suggested that transnational parties may enhance the process of integration. It does not provide a constitutional definition of what amounts to a European political party and what its status entails in terms of echoing the political will of the Union citizens. At Nice, the Article was extended allowing for the Community legislator to

representative democracy in the EU, political representation and control need to happen at the place where decisions are taken. The EP itself has declared that Euro-parties need to organise and act on a transnational basis so as to monitor, discuss and influence the expression of political will at European level. A party system is emerging in the Union, but is embryonic and hardly reflects a supranational structure.[43] Although the EU political groups are, generally speaking, organised along a left-right continuum that corresponds to the main national ideological party families found in most Member States, the distribution of nationally elected members in the Parliament does not preclude the absence of some Member States in a given political group.[44] Hence, the linkage between the two levels becomes problematic.

Procedural elements like the absence of an authentic 'uniform electoral procedure' may also hinder the process of direct representation, as elections to the European Parliament take place in the Member States within constituencies designed by each State. The reality about EP elections is that they are often perceived as 'second-order' fought primarily on national issues,[45] institutionally dependent on national party systems. Even with the creation of transnational parties their activities and organisational structure are dependent upon national party agreement; they are national instruments. Absence of uniform electoral system means that each Member States determines its own rules of EP elections. They nominate candidates, organise and finance the electoral campaigns. But once elected, MEPs have to establish a dual function of maintaining a political profile in domestic politics and creating for themselves a status and a platform

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lay down a statute for political parties at European level, but provision was made only for secondary issues, like funding.

[43] Euro-parties are composed of parties from each of the EU Member States (sometimes more than one per state) and in some cases from countries outside of the EU (especially in the case of the European Green Party which is more pan-European in nature with 32 full member parties). EP Report A4-0342/96 on the constitutional status of the European political parties. Rapporteur: Tsatsos, 30.10.96. H.Schmitt and J.Thomassen (eds), *Political Representation and Legitimacy in the European Union*, op.cit. n.37, chapter 12. M.Pedersen, op.cit. n.40, pp.16-7.

[44] M.Pedersen, op.cit. n.40, pp.20-1. On the history and development of the European party groups, see A.Kreppel, *The European Parliament and Supranational Party System –A Study in Institutional Development*, Cambridge University Press, 2002. On a more detailed analysis on the EU political parties system, see F.Attiva, 'Party Fragmentation and discontinuity in the EU', in *Transnational Parties in the European Union*, D.S.Bell and Ch.Lord (eds), Ashgate, 1998 and S.Hix, A.Kreppel and A.Noury, 'The Party System in the EP: Collusive or Competitive?', (2003) 41 JCMS 309-331.

[45] K.Heidar, op.cit. n.41.

within the EP, a fact that may be said to diminish the ability for Euro-parties to aggregate interests and programmes at European level. The proposal made during the 2000 IGC by the Parliament and the Commission[46] for a number of members to be elected on European-wide lists that would be presented to all voters throughout the Union was discounted at an early stage, because it would represent an ambitious change in EP elections, given the Union's current level of integration. Article I-46 TeCE does not alter the legal context as it stands under the Treaty of Nice, while Article III-331 allows for regulations governing such parties to be established by European laws, including rules governing their funding, replicating Article 191 EC.[47]

Democracy in the EU would be fostered by strong and independent European parties fighting on truly European rather than national issues. The post-electoral survey to the 2004 EP elections[48] shows that there is a positive relation between commitment to a political party and going to the polls. Correspondingly, the less people feel close to a political party, the more they tend to abstain. Here, we have another indicator confirming the hypothesis that abstention, whether observed in the European or in national elections, is above all related to a low degree of 'politisation', or even distrust for politics. The connection between the voting public and parties at European level will remain weak as long as campaigns are almost exclusively fought over national issues.

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[46] D.Galloway, *The Treaty of Nice and Beyond*, Sheffield Academic Press, 2001, p.116.

[47] The first recognises that 'political parties at European level contribute to forming political awareness and to expressing the will of Union citizens', whereas the second provides for the adoption of regulations governing them and in particular their funding. The recent regulation on the status and funding of European political parties from November 2003 might encourage their development and institutionalisation. Regulation (EC) No. 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding, OJ L 297, 15.11.2003.

[48] Flash Eurobarometer 162, *Post European elections 2004 survey*, European Commission, July 2004.

4.3.1 The European Parliament's ability to act as 'opposition'

Although the EP's powers have notably increased since Maastricht, the debate on the democratic deficit is as vivid as ever because of the impact elections make and the very nature of the Parliament as a representative institution. Rather than increasing its democratic legitimacy, the Union is facing a crisis of representation mainly because European elections do not serve the function of linking the opinions of the electorate to the decision-making arena.[49] One would ask what purpose European elections serve. As Karlheinz Neunreither rightly points out, the main shortcoming of the Union governance is that there is no formal function of an 'opposition', which is very much a vivid reality in the practical and political life of all the Member States.[50] Unlike national parliaments, the European Parliament does not have the traditional dichotomy between majority and opposition. Because the EU does not possess clear institutional or procedural means of sanctions, the inability of elections to remove officials for policy failure calls into question both the democratic legitimacy of the EU and the role of the EP in providing one. European elections change little at least in terms of political agenda. As the EP does not have a right to initiate legislation, it is not possible to offer substantive proposals for a legislative programme as part of election manifestos.[51]

In section 4.2, it was observed that the constitutional significance of codecision pertained to the Parliament's ability to effectively influence the content of a legislative act. However, is there any other significance to this fact apart from the realisation that the Parliament may effectively utilise codecision to politically enhance its position in the institutional balance? In other words, what is the impact of the amendments proposed and/or passed by the EP on the EU citizen? Do amendments reflect the needs and interests of the electorate? Simply put, the more democratic the process, the more important should be the resulting

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[49] J.Thomassen, 'Parties and Voters. The Feasibility of a European System of Political Representation', in *The EP-Moving toward Democracy in the EU*, B.Steunenberg and J.Thomassen (eds), Rowman and Littlefield Publishers, 2002, p.15.
[50] K.Neunreither, 'Governance without Opposition: The Case of the European Union', (1998) 33 Government and Opposition 419-441, pp.420-423 and 434.
[51] J.Smith, *Europe's Elected Parliament*, Sheffield Academic Press, 1999, pp.95-6 and 124.

legislation for the citizens. In its general amending strategy, the EP tends to be 'politically substantive', to focus on the political implications of a measure and to take up issues that reflect the needs and concerns of the electorate. Codecision activity is highly concentrated on issues like the environment, public health and consumer policy, regional policy, transport and tourism.[52] It also tries to reverse the tendency by which the Council adopts legislation which is normally technocratic in approach and represents the lowest common denominator. For instance, regarding the Directive on speedometers for two-or-three-wheel motor vehicles,[53] the parliamentary committee on transport and tourism considered that a proposal should go beyond technical specifications necessary for the smooth operation of the internal market to accommodate sustainable mobility, road safety and environmental protection.

At this stage, it is only appropriate to ask whether the EP is at all visible to its constituents. Opinion polls have shown that, although the Parliament is the most identifiable EU institution, people have ambivalent perceptions about its tasks as well as how MEPs affect their lives. Even among the most favourable of European attitudes to the Parliament (e.g. the Belgians and Danish), there is the belief that the EP enjoys greater influence than it should to the detriment of the citizens, a clear indication that they do not perceive the Parliament as defending their interests.[54] Opinion polls also confirm the assertion that European elections are 'second order' as citizen willingness to vote is limited, unless they take place at the same time as national ones.[55] Some commentators argue that the low turnout both reflects and accentuates the democratic legitimacy deficit of the Union. Voter apathy and electoral absenteeism is not a problem peculiar to EP

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[52] Activity Report PE287.644, op.cit. n.14. D.Judge and D.Earnshaw, *The European Parliament*, op.cit. n.39, p.252. S.Boyron, op.cit. n.21, pp.153-155.

[53] EP Report A4-0491/98 on the proposal for a Directive on speedometers for two-or-three-wheel motor vehicles (COM(98)0285-C4-0317/98-98/0163(COD)). Rapporteur: Barton, 9.12.98.

[54] W.Wessels and U.Diedrichs, 'A New Kind of Legitimacy for a New Kind of Parliament - The Evolution of the European Parliament', EloP 06/97. How Europeans see themselves - Looking through the mirror with public opinion surveys. European Documentation Series, Office for Official Publications of the European Communities, Luxembourg, 2001. Eurobarometer 59, *Public opinion in the European Union*, Spring 2003. Charter 88, *Five Democratic Tests for Europe*, 2003.

[55] On the other hand, voters' attitudes do manifest transnational trends. Electoral behaviour is normally affected by national institutional factors, such as compulsory voting, or voters' apathy in general. There are variations in the public support, like the perceptions of representative democracy at national level, but also attitudes/support to EU integration and membership Flash Eurobarometer 162, op.cit. n.48.

elections. First and foremost, it is an expression of disappointment in the political system, national or otherwise. However, public attitudes towards the EP are important to its legitimacy; an institution designed to directly represent citizens ought to enjoy public respect and support. Very low support is likely to motivate institutional change towards the curtailment, rather than enhancement, of the EP's authority.[56] Hence, the real appraisal of the Parliament's representativeness consists in the presence of a European 'political class', a body of citizens, who are aware of Europe-wide political agendas and who conceive themselves as participating in debates over common European issues[57] as members of a European society, as part of a European public space where such issues can be debated. Unless and until this is done, the Parliament's contribution to the democratic legitimacy of the Union is overstated.

4.4 The EP as a multifunctional legislature

In the 'parliamentary model', the key feature of democracy to subject the government to parliamentary scrutiny implies that parliaments function not only as legislatures in the strict sense, but their role encompasses wider issues relating to government control and authorisation. Equally, the substance of parliamentary representation in the Union requires a Parliament with significant law-making and control powers.[58] In *Matthews v. UK*, the UK Government contended that the Parliament lacked the most fundamental attributes of a legislature on the basis of a conception of legislatures as essentially law-making bodies. That is,

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[56] A.Lijphart, 'The Problem of Low and Unequal Voter Turnout - and what we can do about it', Reihe Politikwissenschaft 54/98. M.Gabel, 'Public Support for the European Parliament', (2003) 41 JCM 289-308, p.290. The 2004 European elections were marked by a particularly low rate of participation which showed record abstentionism and by strong mobilisation of Euroscepticism in certain Member States: Flash Eurobarometer 162, op.cit. n.48.

[57] N.MacCormick, *Who's Afraid of a European Constitution?*, Imprint Academic, 2005, pp.53-4.

[58] S.Smismans, *Law, Legitimacy and European Governance - Functional Participation in Social Regulation*, OUP, 2004, p.3. D.Judge and D.Earnshaw, *The European Parliament*, op.cit. n.39, pp.9-10. J.Gerkrath, op.cit. n.1, p.78. C.Harlow, 'Citizen Access to Political Power in the EU', EUI WP 99/2, p.10.

the power to initiate legislation and the power to adopt it.[59] However, in its judgment, the European Court of Human Rights (ECHR) held that the EP was sufficiently involved both in the legislative process that led to the passage of legislation, especially under Articles 251 and 252 EC, and the democratic supervision of Community activities. It seems that the ECHR espoused the same multifunctional nature of legislatures, namely, the idea that government control, rather than law-making, has become their prime function. It further stated that monofunctional legislative role had little place in the reality of EU decision-making, which tends to be a limited elaboration of broad aims and increasingly delegated rule-making powers to the Commission.[60] It remains to be seen, whether the treaties have envisaged a multifunctional legislative role for the Parliament.

The 'parliamentary model', which nestles at the heart of European civic cultures, has deeply influenced constitutional reforms in the EU, but has not been transplanted to the Union's institutional system whose peculiar nature gives rise to hybrid practices.[61] Although the treaties provide for several mechanisms to ensure executive accountability, the collective accountability of the EU executive to the EP is limited. For instance, the Parliament's power of democratic supervision can be found in Articles 193 and 195 EC, under which by means of a parliamentary Ombudsman or committees of inquiry the institution can investigate instances of alleged contraventions and maladministration committed by other EU institutions. Also, pursuant to Article 4 TEU, the European Council is required to report to the EP on the progress of the EU. The EP can claim wider and arguably substantive control only in the case of the Commission.

The EP is to formally approve the appointment of Commissioners and their President, pursuant to Article 214 EC. Accordingly, the EP is in a position to determine the thrust and maximise the content of the mandate given to the

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[59] *Matthews v. UK*, Judgment of February 18, 1999 [1999] 28 E.H.R.R. 361. K.Muylle, 'Is the Parliament a "Legislator"?', (2000) 6 EPL 243-252, pp.249-251.
[60] Ibid.
[61] P.Magnette, 'Appointing and Censuring the European Commission: The Adaptation of Parliamentary Institutions to the Community Context', (2001) 7 ELJ 292-310, p.292.

Commission in terms of policies and programmes.[62] The Parliament's involvement in the investiture procedure was increased marginally at Nice and proposals to link parliamentary election to the appointment of the President and the Commission were quickly discarded. In this specific regard, the advance towards a more 'parliamentary system' through effective involvement in the appointment process of the executive was stalled at Nice.[63] The Constitutional Treaty - Article I-27 - does not propose any substantial changes to the way the President is appointed but it clearly states that when the European Council proposes a candidate for the Presidency for election by the EP, the latter must take account of the results of the European elections. This change indirectly increases the influence of the Parliament and gives greater political significance to the European elections.

The EP is often depicted as an institution with strong committees. As its powers have increased over time, so has the role of EP committees in shaping EU legislation and in holding the Commission accountable.[64] The fate of the Santer Commission and, more recently, the rejected nomination of Mr. Buttiglione as Commissioner for Justice and Home Affairs indicate the degree to which Parliament can exert and sustain pressure on the Commission. The EP may force the Commission to resign *en masse*, but the real power to sanction individual Commissioners has been reserved for the Commission President (Articles 217 EC and I-28 TeCE). Therefore, the motion of censure may prove ineffective as a mechanism of ensuring executive political responsibility[65] and it usually

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[62] EP Report A4-0488/98 on the institutional implications of the approval by the EP of the President of the Commission and the independence of the members of the Commission. Rapporteur: Brok, PE226.877, 8.12.98.

[63] D. Judge and D.Earnshaw, *The European Parliament*, op.cit. n.39, p.62.

[64] V.Mamadouh and T.Raunio, 'The Committee System: Powers, Appointments and Report Allocation', (2003) 41 JCMS 333-351, pp.333-334, 337 and 348: When explaining the EP's legislative success, scholars have emphasised the interaction between party groups and committees. More specifically, the rapporteurship system with individual members/rapporteurs accumulate policy expertise, build consensus among party groups and negotiate with the Commission and the Council, three factors essential for legislative influence. A very recent example of the success of parliamentary committees is the adoption by the transport and tourism committee of several major amendments to the rail passengers' rights bill in the so-called Third Railway Package: EP Report A6-0123/2005 Proposal for a Regulation of the EP and of the Council on International Rail Passengers' Rights and Obligations. Rapporteur: Sterckx Dirk, PE 347.287, 28.4.2005.

[65] Article 201 EC. The first time the EP tried to use its power to censure the Commission over its management of the EU budget, in 1998, did not materialise, because some parliamentary groups could not agree on how to handle the crisis. However, the Parliament did manage to set up a

denounces the Commission's lack of competence and not the content of the policies it promotes, treating the latter more as an administration than a government. Should a motion arise, the submission to a 'committee' of experts in the midst of a highly political procedure is in itself evidence that MEPs are more willing to present themselves as neutral experts who follow the scientific objectivity of facts than to act as politicians.[66] The argument also goes, whether the Commission is politicised enough to perceive itself as 'government' and not merely as a body of civil servants. Certainly, the institutional relationship between the EP and the Commission cannot be likened to the traditional government-parliament model, where the vote of approval by parliament is an opportunity to record a parliamentary majority with the commitment to support executive actions throughout its term of office.

EP is also depicted as an institution with weak political parties.[67] Their task of facilitating European awareness and expressing the political will of the citizens of the Union is not adequate, unless they partake in the political process that determines the structure of the EU government and the political goals to be pursued. Currently, the Euro-parties' functions are restricted to the preparation of EU legislation and to the screening of the Commission candidates proposed by the Member States. Likewise, the President and the Commissioners may not proclaim affiliation with any political party, nor may they consider themselves to be bound by their specific political program. By implication, they do not share political philosophies and agendas with any of the political groups in the EP - or Member States' parliaments - and therefore they have no political ties with the EU citizens.[68] Therefore, there should be a direct linkage between the election of the President of the Commission and the outcome of parliamentary elections. This does not require any treaty reform; all that is needed is for political parties

committee of independent experts to investigate allegations of fraud, mismanagement and irregularities in the Commission. The damning 'Wise Men' Report led to the *en masse* resignation of the Commission in 1999 and fuelled a debate and a series of measures regarding its administrative reform. Committee of Independent Experts, *First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission*, 15 March 1999. White Paper, *Reforming the Commission*, COM(2000)200, 1.3.00.

[66] P.Magnette, op.cit. n.61.

[67] V.Mamadouh and T.Raunio, op.cit. n.64, p.333.

[68] W.Van Gerven, *The European Union. A Polity of States and Peoples*, Hart Publishing, 2005, pp.352-353.

contesting the European elections to nominate their candidates, allowing the voters to consider the choices by somehow linking EP candidates to the candidates for the Commission Presidency, while the elected MEPs will have to approve the nomination put forward by the European Council.

4.5 Conclusion

Due to the fact that parliaments are considered strongholds of democracy and legitimacy in the Member States, the EP does enjoy a symbolic importance in the Union's institutional system. It is the only supranational institution that receives a direct mandate and it has also been set up to constitute the democratic component, at least since direct elections were introduced. To this extent, the EP can be regarded as the democratic pillar of the Union[69] and its role in the Union's decision-making process has been enhanced with each treaty reform so that it is sufficiently involved in law-making and in the general democratic supervision of the activities of the EU.

In terms of form and function, the EP differs considerably from its national counterparts and as such it provides a poor model of representative democracy; it is not yet fully developed either as a representative body or as an institution of political authority.[70] The lack of linkage between public preferences and constitutional decisions by the EP as well as the 'second order' character of European elections significantly diminish the EP's capacity to command public assent. At EU level, there is no government, and if one regards the Commission as such, it is not a party government. The EP fails to provide a mechanism for popular opinion to influence EU policy. An elected majority in Parliament does not express the policy preferences of the majority of citizens. Thus, one might

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[69] J.Blondel et.al., op.cit. n.30, p.11.
[70] J.Mather, 'The EP–A Model of Representative Democracy?', (2001) 24 West European Politics 181-201.

conclude that the Union's system of parliamentary representation scores high for the development of a parliament with considerable attributions but still scores low in terms of representational and electoral connection.[71] Since Maastricht, the role of the EP has been strengthened significantly, which is said to have enhanced the Union's democratic legitimacy, but this fact has not appeased public discourse on the Union's democratic deficit. This paradox implies the loss of validity in the claim that democratisation means parliamentarisation of the Union.[72] The democratic content of decision-making at EU level cannot be reduced to the degree to which the EP has a say.

The *sui generic* nature of the EU makes the 'parliamentary model' difficult to apply as a solution to its democratic deficit. That is partly due to the fact that the 'parliamentary model' is allied to the statal concept of 'territorial' representation which is not simply the case for the EU system that is gradually evolving towards functional forms of representation (as will be examined in chapter 6). Full parliamentarisation of the EU on the model of the national constitutional state may aggravate rather than solve the democratic deficit problem.[73] The absence of a truly supranational party and election system suggests that the EU governance is not a fully-fledged federal system of political representation. Nonetheless, the citizens' representation in a double capacity, at national parliaments and at the EP, is not empty of federal-like characteristics. The balance between these two types of representation reflects the level of integration of the EU polity, rather than a change in its democratic legitimacy. A transfer of power from the national to supranational level is therefore neutral in principle in terms of overall democracy, if not detrimental to the democracy provided at national level. Therefore, propositions made to strengthen the position of the EP in the decision-making process are not to be seen as an increase of the democratic standard of the Union, but as a strengthening of its federal content.[74] A dramatic shift of

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[71] A.Muntean, 'The EP's Political Legitimacy and the Commission's "Misleading Management": Towards a "Parliamentarian" EU?', EIoP 4/2000. T.Hartley, *Constitutional Problems of the EU*, Hart Publishing, 2000, p.19. J.Gerkrath, op.cit. n.1, p.78.

[72] K.Lenaerts, and R.Bray, *Constitutional Law of the EU*, Sweet and Maxwell, 2004, p.654. A..Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', (2002) 40 JCMS 603-624.

[73] S.Smismans, op.cit. n.58, p.16.

[74] K.Lenaerts and E.de Smijter, 'The Question of Democratic Representation', in *Reforming the TEU – The Legal Debate*, Winter et.al.(eds), Kluwer Law International, 1996, pp.176-7. The

institutional balance towards the EP would mean just that: shift of power away from national parliaments. A strong legislative role for the EP would exacerbate public anxieties about the weakening of national and regional parliamentary control. Hence, the idea of a 'Peoples' Congress' was abandoned early is the Convention.

same might be said to hold true for every shift of power from the Council to the Parliament, especially since the problem of lack of appropriate EP representation could be arguably compensated by the double majority in the Council.

CHAPTER 5

THE JUDICIALISATION OF LAW-MAKING

5.1 Introduction

As examined in Chapter 2, the debate on the democratic legitimacy crisis of the Union is relevant to its changing constitutional framework which has been brought about by the processes of European integration and constitutionalisation, as facilitated primarily by the Court's jurisprudence on the nature of the EU legal norms and their place within the Union's legal system, as envisaged by the Court itself. What this chapter will examine is how the Court has attempted, not without criticism, to constitutionalise EU law by creating a system of legal protection under EC law based on a discourse of legal principles and individual rights. Relevant to this analysis is the manner by which the Court used the judicial review mechanism to institutionally position itself in the decision-making process, as it sought procedurally and substantively to control law-making pursuant to its duty to ensure that the 'rule of law' is observed. The Court employed institutional principles and fundamental rights to blur the institutional separation between itself and the other EU institutions.

The ultimate aim of the analysis is to offer some clues regarding the relationship between 'democracy' and the 'rule of law' in order to evaluate the Court's contribution to European democracy. The present contribution does not intend to either give an account of the emergence of the human rights discourse within the EU, or to appraise the effectiveness of the system of remedies created by the Court and its relationship with national courts. Both have been copiously revisited in academic scholarship.

5.2 Judicial review of EU acts: setting constitutional constraints on legislative freedom

Under the constitutional model, courts in judicial review proceedings act essentially as overseers of the legislative process in the name of a 'higher law' which plays an essential role in defining the constitutional limits of legislative activity. In the case of the EU, Article 220 EC constitutes a general clause of jurisdiction for the Community Courts[1] and the very foundation of judicial review conferred expressly on the European Court of Justice (ECJ)[2] by means of which the 'rule of law' should be ensured under all circumstances. The 'rule of law' doctrine determines that the exercise of legislative competence by the EU institutions is subject to normative controls and general normative values or principles which act as constitutional constraints. It provides a degree of legal accountability, a framework for the exercise of legislative power in constitutionally acceptable terms both as an objective guarantee of legality and a subjective safeguard for the individuals affected.

Procedural scrutiny of the legislative process is a ground for judicial review under Article 230(2) EC and a fundamental premise of legal accountability (accountability through law). The ECJ has to ensure that institutions act within the remit of conferred powers[3] but also with the procedural guarantees found in the treaties. Such duty is imposed, *inter alia*, by Article 253 EC which obliges the institutions to state the reasons on which their decisions are based. Martin Shapiro[4] underlines the Court's readiness to recognise the potential of this laconic requirement, as he calls it. The standard formula justifying reasoned decisions stresses the control function of judicial review, but also promotes the principle of transparency. The ECJ insists that the obligation to state reasons found in Article 253 is not a mere formality, but it must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain

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[1] Article I-29 TeCE. Since Nice, the obligation to ensure that in the interpretation and the application of the Treaty the law is observed rests both on the ECJ and CFI.
[2] Under Article 230 TEC (Article III-365 TeCE).
[3] Choice of the correct legal basis as specified in treaty articles.
[4] M.Shapiro, 'The Giving Reasons Requirement', (1992) *University of Chicago Legal Forum*, pp.179 and 180, found in C.Harlow, *Accountability in the EU*, OUP, 2002, p.160.

the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure may have in obtaining explanations.[5] It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.[6]

The ground of challenge on the basis of infringement of the Treaty, or 'any rule of law', relating to its application[7] is not restricted to the definition of the procedural requirements that are relevant to the EU legislative process. General principles play a central role in the EU legal order, alongside primary and secondary legislation, comprising a distinct and well defined body of common law. One category is fundamental rights and there is also reference by the Court to principles of institutional law which are intended to regulate institutional relations, yet hardly ever developed into a coherent grouping. The reason may be that, although it did refer to 'the general principles on which the institutional system of the Community is based and which govern the relations between the institutions and the Member States',[8] it has never developed this statement into a consistent doctrine of institutional principles. Institutional principles are more of a device of *balancing* legislative power between the EU institutions, as in the classical 'separation of powers' theory. The influence of such doctrine lies behind the idea of 'institutional balance' used by the ECJ as an interpretative principle of EU law.

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[5] See, *inter alia*, Case C-445/00 *Austria* v *Council* [2003] ECR I-8549, para.49. Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, para.55. Case C-304/01 *Spain* v *Commission* [2004] ECR I-7655, para.50. Joined Cases C-138/03, C-324/03 and C-431/03 *Italy* v *Commission*, judgment of 24.11.2005, not yet reported, para.54.

[6] See, for instance, Case C-122/94 *Commission* v *Council* [1996] ECR I-881, para.29. Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, para.63. Case C-17/99 *France* v *Commission* [2001] ECR I-2481, para.36. Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, para.48.

[7] Article 230(2) TEC.

[8] For instance, Joint Cases 205-215/82 *Deutsche Milchkontor v Germany* [1983] ECR 2633, para.17. B.De Witte, 'The Role of Institutional Principles in the Judicial Development of the of the EU Legal Order', in *The Europeanisation of Law: The Legal Effects of European Integration*, F.Snyder (ed), Hart Publishing, 2000, p.83-4. See analysis in section 5.2.1.

The issue of judicial review of EU legislation actually raises issues regarding the margin of discretion allowed to the EU institutions to engage freely in decision-making. Such limitations may be imposed by the Community courts even beyond the scope envisaged in the treaties. It also highlights the fact that while the ECJ tries to promote the ideal of 'limited government' by regulating institutional relations, the legislative process and indirectly the content of legislation, it actually blurs the borderline between judicial and political activities. In a nutshell, it raises concerns about the institutional equilibrium in the legislative process and, by association, about the democratic legitimacy of EU decision-making.

5.2.1 Adjudicating 'institutional balance'

The European courts subject EU decision-making to a test of 'democracy', as an unwritten principle of higher law,[9] which regulates the relationship between the EC institutions and against which the legitimacy of EC acts may be reviewed. The use of the democratic principle in jurisprudence seems akin to liberal democratic values found in the constitutional traditions common to the Member States. To the ECJ, institutional balance is a fundamental part of European democracy, where the starting point of democratisation of decision-making is the empowerment of the Parliament.[10]

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[9] 'Democracy' is not part of the objectives and activities that affect policy-making in the EU (Articles 2 and 3 TEC and Articles 2 TEU). It is, however, an overarching principle along with the rule of law, liberty and respect for fundamental rights (Preamble and Article 6(1) TEU). This is rectified by the Constitutional Treaty in Articles I-2 and I-45-52.

[10] In Case T-135/96 *UEAPME v Council* [1998] ECR II-2335, para.89, the CFI went a step further to emphasise that 'the principle of democracy on which the Union is founded requires – in the absence of the participation of the EP in the legislative process- that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council ... with a legislative foundation at Community level. In order to make sure that the requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative'. B.De Witte, op.cit. n.8, p.95. S.Ninatti, 'How Do Our Judges Conceive of Democracy? The Democratic Nature of the Community Decision-Making Process under Scrutiny of the ECJ', JMWP 10/03.

First reference to the term 'institutional balance' is to be found in *Meroni*[11] where the Court established the *Meroni* doctrine, which precludes the delegation of discretionary powers to bodies other than those established by the treaties on the ground that this would upset a fundamental guarantee contained in the balance of powers between the European institutions. It was not until *Chernobyl* that the ECJ indicated what 'institutional balance' meant, when it referred to it as 'a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community'. A breach of such rule might be judicially sanctioned.[12] The Court sought to define the abstract division of tasks found in Article 7 (ex 4) TEC as 'the powers of the institutions are not always based on consistent criteria'.[13] From its case law, one can distil further values that underlie institutional balance, namely, that each institution should enjoy a sufficient independence in exercising its powers[14] without assigning them unconditionally, or encroaching on the powers and prerogatives of other institutions.[15]

The Court has generally refrained, in its jurisprudence, from formally accepting institutional balance as a 'principle' with an independent legal content separate from the attribution of powers already found in the treaties. This holds true with one major exception, its case law dealing with the procedural rights of the European Parliament, where the Court blatantly dispensed with the text of Article 230 EC in the name of institutional balance; particularly in *Chernobyl*, it held that the absence in the Treaties of any provision giving the Parliament the right to

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[11] The Court held that '...there can be seen in the balance of powers which is characteristic of the institutional structure of the Community a fundamental guarantee granted by the Treaty to the undertakings and associations of undertakings to which it applies. To delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render the guarantee ineffective.' Case 9/56 *Meroni v High Authority* [1957 and 1958] ECR 133, p.152.

[12] Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, paras.21-22.

[13] Case 242/87 *Commission v Council* [1989] ECR 1425, para.13.

[14] Accordingly, each institution is entitled to regulate its own organisation and manner of operation (including internal decision-making procedures) within the limits of the rules set forth in the Treaties. Case 5/85 *AKZO Chemie v Commission* [1986] ECR 2585, paras.37-40.

[15] *Meroni*, op.cit. n.11. Case 149/85 *Wybot v Faure* [1986] ECR 2391, para.23. Case 25/70 *Einfuhr und Vorratsstelle Getreide v Koester* [1970] ECR 1161, paras.8-9. K.Lenaerts and A.Verhoeven, 'Institutional balance as a Guarantee for Democracy in EU Governance', in *Good Governance in Europe's Integrated Market*, C.Joerges and R.Dehousse (eds), OUP, 2002, pp.36-38 and 44-46.

bring an action for annulment might constitute a procedural gap, but could not prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the treaties.[16]

The concept of institutional balance was used by the Court to delimit the competences between the Council and the Commission and to define or rather enhance the institutional position of the EP in the legislative process *vis-à-vis* the other institutions. As noted by AG Darmon,[17] the opening of institutional conflict before the Court arose almost entirely with the introduction of parliamentary elections by universal suffrage. The Parliament's desire to be more closely involved in the Community decision-making process acquired a new dimension with the impetus provided by its new legitimacy. This is an interesting point because it seems to inspire the Court's reasoning, specifically, due consultation of the Parliament *in the cases provided for by the Treaty* – emphasis added - constitutes an essential procedural requirement disregard of which renders the measure concerned void. The effective participation of the EP in the legislative process represents an essential factor in the institutional balance intended in the Treaty.[18]

The *Roquette* judgment was the first step towards a jurisdictional guarantee of parliamentary consultation, as the Court established a direct link between the Parliament's procedural prerogatives and the democratic principles underlying

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[16] B.De Witte, op.cit. n.8, pp.91-2. Case C-70/88, op.cit. n.12, paras.26-7: The absence of any reference to the European Parliament in that provision did not, however, prevent the Court from holding in *Chernobyl* that 'an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives'. Nice reforms rendered EP a privileged applicant under Article 230 (ex 173) TEC.

[17] Opinion of AG Darmon in Case 302/87 *EP v Council* [1988] ECR 5615, para.28. S.Ninatti, op.cit. n.10.

[18] Case 138/79 *Roquette Freres* [1980] ECR 3333, para.33. Case 139/79 *Maizena v Council* [1980] ECR 3393, para.34. Case C-65/93 *Parliament v Council* [1995] ECR I-643, para.21. Case C-392/95 *Parliament v Council* [1997] ECR I-3213, para.14. Case C-408/95 *Eurotunnel and Ors* [1997] ECR I-6315, para.46. Any action for annulment brought by the Parliament against an act of the Council and the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that is founded only on submissions alleging their infringements and the Parliament's prerogatives include in particular participation in the drafting of legislative measures. The CFI very rarely intervenes on the question of the obligation to consult the Parliament, but it seems unlikely to find that there has been a breach, especially if an act that had been adopted without parliamentary reconsultation was not called into question by the Parliament itself. See for instance Joint cases T-125/96 and T-152/96 *Boehringer v Council and Commission* [1999] ECRII-3427.

the EC legislative process. Two core arguments outlined its reasoning; the presence of the EP in the legislative process as an element of institutional balance provided for in the Treaty along with the need for peoples to participate in supranational decision-making.[19] The Court further qualified the duty to consult the Parliament as implying that it should be reconsulted whenever the text finally adopted, viewed as a whole, departed substantially from the text on which the Parliament had been consulted, unless amendments essentially corresponded to the wish of the Parliament itself.[20] The legislating institution could not dispense with that requirement on the basis of prior knowledge of the Parliament's wishes, because that would seriously undermine the effective participation of the Parliament in law-making.[21] Observance of the consultation requirement implies that the Parliament has actually and meaningfully expressed its opinion and the requirement cannot be fulfilled by the Council simply asking for the opinion. In situations where the Council is faced with the urgency to adopt legislation, it shall use all the possibilities available under the Treaty and the Parliament's rules of procedure to obtain the preliminary opinion of the latter.[22]

The Court's tenor shifted following the introduction of the new cooperation and codecision procedures by Maastricht, which, on the one hand, reinforced the position of the Parliament in the legislative process while, on the other, required the Community judge to delineate more clearly the newly created labyrinth of

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[19] Case 138/79, ibid: "the consultation ... is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly." Therefore, a simple request for an opinion without having exhausted all the means necessary to obtain it was not sufficient to avoid the breach of an essential procedural requirement of the act. AG Gelhoed affirms the nexus between the two democratic principles in *Imperial Tobacco*, para.179: 'institutional balance plays an important role in the decisions of the Court. In this, however, the Court establishes a direct link with the prerogatives of the EP and the democratic principles underlying them'. S.Ninatti, op.cit. n.10.

[20] Case 41/69 *Chemiefarma v Commission* [1970] ECR 661. Case 817/79 *Buyl v Commission* [1982] ECR 245. Case C-65/90 *Parliament v Council* [1992] ECR I-4593, paras.16 and 20-1. Case C-21/94 *Parliament v Council* [1995] ECR I-1827, para.18. Case C-388/92 *Parliament v Council* [1994] ECR I-2067, para.10. Case C-280/93 *Germany v Council* [1994] ECR I-4973, para.38.

[21] Case C-21/94, ibid, para.25. Case C-392/95, op.cit. n.18, para.15. Case C-408/95, op.cit. n.18, para.46. Case C-316/91 *Parliament v Council* [1994] ECR I-625, para.17.

[22] C-65/93, op.cit n.18, para.22. Case 138/79, op.cit. n.18, paras.36-7.

procedures. In *EP v Council* [23] despite the fact that the Court reiterated the need to adopt acts subject to prior parliamentary consultation as part of the correct legislative procedure, it also affirmed that 'interinstitutional dialogue' on which parliamentary consultation is based is subject to a mutual duty of sincere cooperation. The closing remarks of the case are noteworthy: Parliament's plea was dismissed as retaliatory by the Court. Hence, the lack of observance of the essential requirement of parliamentary consultation was justified by the lack of observance on the part of the EP of its obligation to cooperate sincerely with the Council.

Along with the institutional duty of parliamentary consultation, the legal basis issue constitutes another means of judicial scrutiny over the legislative activity of the EU institutions. In view of the open-ended character of treaty provisions and the absence of a formal hierarchy among the different legislative procedures, the choice of the appropriate legal basis becomes essential for the maintenance of the rule of law, as this will determine the degree of legislative competence of the EU institutions in the specific policy areas entrusted to the Community and, by reference, the legal validity of any adopted measure. Besides, the legal basis determines the procedural requirements applicable to the legislative process, as well as the relevant voting rules. The legal basis issue, therefore, is never neutral in terms of institutional politics: it is an instrument for each institution to maximise its influence in decision-making,[24] a fact that has caused institutional conflict before the Court and an increasing tendency by the latter to dominate the choice of the appropriate legal basis through judicial review.

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[23] Case C-65/93, op.cit n.18, paras.23-24 and 27-8. The contested regulation provided for preferential tariffs applying to certain products coming from certain third countries. There was urgency in adopting the regulation because it had, *inter alia*, to make the system of preferential tariffs conform to the imminent initiation of the Single European Market on 1 January 1993. On October 22, the Council asked the EP to express its opinion according to urgent procedure, so that the act could be adopted before January 1993, the scheduled date for entering into force of the regulation. On December 21, by which point it was clear that the Parliament would not have given its opinion before the New Year, the Council decided to adopt the act, despite the lack of parliamentary consultation. S.Ninatti, op.cit. n.10.

[24] S.Ninatti, op.cit. n.10. D.Chalmers, *EU Law: Law and EU Government. Vol.1*, Ashgate Publishing Group, 1998, p.214. Cases 188-190/80 *French Republic, Italian Republic and United Kingdom v. Commission* [1982] ECR 2545. M.L.Fernandez-Esteban, *The Rule of Law in the European Constitution*, Kluwer Law International, 1999, pp.165-6.

The Court did identify the choice of legal basis as 'an essential institutional problem', yet, its awkward stance has rendered the issue even more problematic. The reasoning in some of its earlier case law was adversative to the adoption of legislation (by the EU institutions) under treaty provisions that did not envisage substantive parliamentary involvement, even if the requirement to consult the Parliament was optional.[25] The prevailing position now seems to be that the choice of legal basis must be based on objective factors, like the aim and content of the measure, which are amenable to judicial review, irrespective of the institutions' convictions or the political necessity for an institution (e.g. the EP to protect public health as part of a campaign) to participate more fully in law-making.[26] One needs to establish the number of objectives and their significance so as to ascertain the number of required bases.[27] The Court went a step further to

[25] Case 68/86 *United Kingdom v Council (Re Agricultural Hormones)* [1988] ECR 855.Case C-316/91, op.cit. n.21, para.16. Case C-70/88, op.cit.n.12. C-300/89 *Commission v Council* [1991] ECRI-2867. The Court also held that where the powers of an institution derive from two treaty articles, that institution is obliged to adopt the relevant measure on the basis of both Articles: Case 165/87 *Commission v Council* (Re *Harmonised Commodity Description)* [1988] ECR 5545.

[26] Case C-22/96 *Parliament v Council* [1998] ECRI-3231. Case C-269/97 *Commission v Council* [2000] ECR I-2257, para.10. Amazingly, the Court rejected the Commission's plea that the contested regulation (beef and veal labelling) should have been adopted under Article 100a (now 95) TEC and not Article 43 (now 37) TEC to enable the EP to participate in the legislative process, as the general objective of the regulation was to protect public health, as part of the BSE campaign. See also, cases C-300/89 ibid, para.10, C-426/93 *Germany v Council* [1995] ECRI-3723, para.29, C-84/94 *United Kingdom* v *Council* [1996] ECRI-5755, para.25, C-164/97 & C-165/97 *Parliament* v *Council* [1999] ECRI-1139, para.12, C-269/97 *Commission* v *Council* [2000] ECRI-2257, para.43, C-336/00 *Huber* [2002] ECRI-7699, para.30, C-491/01 *British American Tobacco* [2002] ECRI-11453, para.93, C-338/01 *Commission* v *Council* [2004] ECRI-4829, para.54 and C-110/03 *Belgium* v *Commission*, judgment of 14.4.2005, para.78, not yet reported.

[27] Case C-281/01 *Commission v Council* [2002] ECRI-12049, para.39. If it is established that a measure simultaneously pursues several objectives, the Court said that a measure can be founded on multiple legal bases, unless some of them are secondary or indirectly linked. Then the predominant objective should prevail and the act adopted on a single legal basis. See for instance, case C-42/97 *Parliament v Council* [1999] ECR I-869, paras.38-40 and 43. However, no dual legal basis is possible where the procedures laid down for each legal basis are incompatible with each other: Cases C-300/89, op.cit. n.25, paras.17-21 and C-164/97 & C-165/97, ibid, para.14. In this context, the opinion of AG Kokott, is quite interesting; a combination of legal bases should not disturb the institutional balance. After confirming established case law, she said that if the contested measure were to be adopted under both legal bases - in this case Article 133 EC which provides no formal right to the EP to participate in common commercial policy and Article 175 EC which provides for codecision - the procedure under Article 133(4) EC could be abruptly supplemented by a codecision right of the Parliament not present in the Article. The Council would, as a result of the extension of the codecision procedure into the sphere of Article 133 EC, be deprived of its exclusive legislative competence and would have to share it with the Parliament. Such a result would contradict the deliberate decision of the Member States, confirmed at several intergovernmental conferences, on the legislative procedure in the common commercial policy. Hence, the decision-making process laid down in the relevant legal basis and the institutional balance laid down in the Treaty could be distorted: Case C-178/03 *Commission v European Parliament and Council*, [2006] ECRI-107, paras.60-61.

declare that in order to determine the appropriate legal basis, it would not only focus on objective factors amenable to judicial review, but also on a certain hierarchy of norms 'settled in its case law' like, for instance, that preference would be given to Article 37 (ex 43) TEC for measure regarding production and marketing of agricultural products.[28] In *EP v Council & Commission*[29] the Court introduced further institutional limitations by construing the scope of conferred legislative powers under Article 7(1) TEC as not including competencies conferred by secondary law, in this case Article 19 of Regulation 820/97. Such 'residual' powers were beyond the limits of powers conferred upon the institutions by the Treaty and the Court refused to carry out an assessment of objectives that would not conform to that. Implicit in the argument is the Court's rebuff to the idea that secondary law conferring residual powers on one institution (the Council) would be permitted to upset the institutional equilibrium inherent in primary law (treaties). But the line of reasoning is not that of safeguarding Parliament's effective participation in decision-making, but rather on the strength of a *de facto* hierarchy of primary law over secondary; Regulation 820/97 could only be amended on a legal basis equivalent to the one adopted, namely, the Treaty itself.

The conclusion drawn from the Court's jurisprudence, as analysed in this section, is that the ECJ comes to assume a complex role when regulating institutional relations. Although the Court never announced institutional balance as a principle *per se*, it was a 'value' created in its jurisprudence as a means of regulating institutional conduct during decision-making. Institutional balance as a notion is not entirely absent from the treaties which assume a certain division of function between the institutions. However, the Court created the concept of institutional balance – one that is neither static nor visibly defined - and further developed the 'values' that underlie it. During this process of constitutional

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[28] Referring to Case C-180/96 *UK v Commission* [1998] ECR I-2265, para.133 and the case law sited therein: Case C-269/97, op.cit. n.24, para.47.

[29] Case C-22/96, op.cit. n.26. Case C-93/00 *EP v Council & Commission* [2001] ECRI-10119, paras.19 and 39-45. The Council ignored the Commission proposal to adopt two regulations (for a system of identification and registration of bovine animals and of labelling beef and beef products) to implement Regulation 820/97 under Article 152 EC which provided for the codecision procedure. It instead adopted the implementing Regulation on the basis of Article 19 of Regulation 820/97, because the EP ignored the Council's threat and introduced amendments on its first reading in the context of Article 251 EC.

interpretation of institutional balance, it is evident, especially in its earlier case law, that the Court adapted the constitutional text of the treaties. A stark example is *Chernobyl*, where it blatantly dispensed with the text of Article 230 EC when it held that the absence in the treaties of any provision giving the Parliament the right to bring an action for annulment might constitute a procedural gap, but could not prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the treaties. The same conclusion applies to the jurisprudence on the duty of parliamentary reconsultation.

It seems that the Court was drawn into the overall political climate and discourse of the time that would link the Union's democratisation with the EP's enhanced participation in decision-making, as the latter enjoyed its newly found legitimacy following the introduction of direct elections. Hence, the Court established a direct link between the Parliament's procedural prerogatives and the democratic principles underlying the EU legislative process. In the post-Maastricht era, the Court appeared to have revised its standard understanding of EU democracy linking a 'rule of law' interpretation of the institutional balance to the mere or at least mainly democratic input of the EP. Again, during this period, academic and political discourse started to increasingly disassociate the Union's democratisation from EP participation. Besides, the Parliament had already acquired new cooperation and codecision powers under the Maastricht Treaty. Hence, in its later case law - including the jurisprudence on the use of the appropriate legal basis - it adopted a more balanced and moderate approach that would subject institutional balance to sincere cooperation between the EU institutions, a principle expressly stated in the Treaty (Article 10 TEC). This was more akin to an approach that perceived the democratic nature of the EU as based on both the role of the EP and the Council.[30] Beyond that, as Stijn Smismans[31] rightly observes, the Court's democratic reading of the institutional

[30] While this is in line with the 'traditional' reading of the institutional system of the EU this has never been stated in the Treaty. Article I-46 TeCE provides for the first time a clear constitutional statement that the democratic representative nature of the EU is based on both the role of the EP and the Council.

[31] S.Smismans 'The Constitutional labelling of "The democratic life of the EU"', in *Political Theory and the European Constitution*, L.Dobson and A.Follesdal (eds), Routledge, 2004, p.135.

balance should extend further to take account of all institutions that represent a different constituency as part of the formal constitutional and informal institutional reality of the EU system of governance. That would constitute a more accurate description of democracy and institutional balance in the EU, a multilevel polity.

5.2.2 Adjudicating 'fundamental human rights'

Respect for fundamental human rights is a condition of legality of Community law and thus a ground of review under Article 230 EC. It is settled case law that these form an integral part of the general principles of law whose observance is ensured by the Community judicature in fulfilling their institutional role pursuant to Article 220 EC.[32] Originally, the Court's approach was that such role did not normally require to rule on the compatibility of Community measures with fundamental rights guaranteed by national constitutions, thus treating them essentially as a matter of national law.[33] However, it was not slow to redefine its institutional role by holding that fundamental rights whilst inspired by the constitutional traditions common to Member States, should be ensured within the framework of the structure and objectives of the Community.[34] The Court protects fundamental rights as 'an integral part of the general principles of [Community] law' and their autonomy from their national source has been

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The Court's approach on the role of other actors - particularly national and subnational – in the institutional balance will be examined in Chapter 6.

[32] Opinion 2/94, *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759. Case C-404/92P *X v Commission* [1994] ECR I-4737, paras.17-25. The Court said that those requirements are binding also on the Member States as they implement Community law: Case 5/88 *Wachauf v Bundesamt fuer Ernaerung und Forstwirtschaft* [1989] ECR 2609, para.19.

[33] Case 1/58 *Stork v High Authority* [1959] ECR 17, p.26.

[34] Case 11/70 *Internationale Handelsgessellschaft v Einfuhr-und Vorratsstelle Getreide* [1970] ECR 1125, para.4.The ECJ implied in a ruling in 1969 that human rights considerations were inherent in EC law when it said that an Article in Decision 69/71 'contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court: Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, p.425.

regularly emphasised:[35] 'the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself.'

No Treaty provision confers on the Community institutions any general competence to enact rules on human rights, except in the area of external development policy.[36] In *Opinion 2/94* the Court, assuming its constitutional role in interpreting the extent of Community powers under the Treaty, denied the use of Article 308 EC as a likely general enabling provision. In this context, the Court took on itself what it saw as an institutional duty to ensure the respect of fundamental rights as a means of preserving the rule of law and created an unwritten catalogue of rights in a substantial body of case law, which has been held to be a kind of negative constraint on EU law and policy-making, loosely constitutionalised by Article 6(2) TEU. Respect for fundamental rights remains open-ended, inspired by national constitutional traditions, the European Convention of Human Rights (ECHR) and other international treaties which the Member States have cooperated on, as restated in Article 6(2).[37]

The Court has recognised a variety of rights in its jurisprudence in an incremental expansion of fundamental rights protection, for instance, the right for respect to one's private life,[38] right to property and to engage in economic

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[35] Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, paras.14-5. Case C-274/99P *Connolly v Commission* [2001] ECRI-1611, para.37. J.H.H. Weiler and S.Fries 'A Human Rights Policy for the EC and the EU: the Question of Competences', JMWP 4/99. According to the Constitutional Treaty, Article I-9(3), fundamental rights constitute general principles of law.

[36] Article 177 EC. However, there are a small number of treaty articles dealing with specific fundamental rights, like Article 12 EC on prohibition of discrimination on grounds of nationality.

[37] Joint cases 60 and 61/84 *Cinetheque SA v Federation Nationale des Cinemas Francais* [1985] ECR 2605, para.26. In *ERT* it imposed a similar duty on Member State courts as regards a certain class of Member State acts. Opinion 2/94, op.cit. n.32. De Burca 'Convergence and Divergence in European Public Law: The Case of Human Rights', in *Convergence and Divergence in European Public Law*, P.Beaumont, C.Lyons and N.Walker (eds), Hart Publishing, 2002, p.135-8. Article 6(2) TEU provides that the Union shall respect fundamental rights as they result from the ECHR and the constitutional traditions common to the Member States, as general principles of Community law. Case C-274/99P, op.cit. n.35, para.38. Case T-112/98 *Mannesmannroehren-Werke v Commission* [2001] ECRII-729, para.60. Joint Cases C-465/00, C-138/01 and C-139/01 *Oesterreichischer Rundfunk and Others* [2003] ECRI-4989, paras.68-9. Case 4/73 *Nold v Commission* [1974] ECR 491, para.13. The ECHR was first specifically referred to in Case 36/75 *Rutili* [1975] ECR 1219 and has been quoted in subsequent case law. However, no attempt will be made to examine the relationship between the EU and the ECHR, as this is not the focus of the current thesis.

[38] Case. C-404/92, op.cit. n.32.

activity[39], rights of defence[40] and some social rights.[41] It stated that the prohibition on discrimination on the grounds of sex is a fundamental human right and recognised the principle of equality - with specific reference to equal pay for equal work - as one of the general principles of Community law, enshrined in the 'social objective' of Article 141 TEC.[42] The Court further considered the scope of the Treaty as it applies to free movement of persons and drew an association between EU citizenship, access to education and non-discrimination by reason of nationality. This development flows in part from the extensive interpretation of the original EEC Treaty by the Court, which brought within the Treaty's scope interests that are not primarily economic.[43] It has repeatedly emphasised that fundamental rights protection is a balancing test between differing interests, as in the case of the Directive 95/46 (processing of personal data) which must be interpreted in light of the right to privacy and the freedom of movement of personal data.[44] Such conditionality of protection offers the Community judicature ample discretion to determine the degree of judicial review.

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[39] Case C-280/93 *Germany v. Council* [1994] ECR I-4973.

[40] The Community judicature has emphasised how important it is that the rights of defence are respected as fundamental rights, particularly by the Commission during administrative procedures and investigative decisions which may lead to the imposition of penalties. Joined Cases 18/65 and 35/65 *Gutmann* v *Commission* [1966] ECR 149, p.172. Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, para.96, confirmed on this point by the ECJ in Joined Cases C-238/99P, C-244/99P, C-245/99P, C-247/99P, C-250/99P to C-252/99P and C-254/99P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, para.59. T-223/00 *Kyowa Hakko Kogyo Co. Ltd, v Commission* [2003] ECRII-2553, paras.96-7. Case T-59/99 *Ventouris v Commission* [2003], ECRII-5257, paras.117-8. Order C-232/02 P(R)1 *Commission v Technische Glaswerke Ilmenau* [2002] ECRI-8977, para.80.

[41] In Case C-173/99 *BECTU* [2001] ECR 4881, the ECJ classified the right to paid annual leave set out in Directive 93/104 as a 'social right'. It did not expressly refer to the Charter, unlike the AG Tizzano (in paras.26-28 of his opinion) but it used the phrase 'social right' rather than 'entitlement'.

[42] Case C-50/96 *Deutsche Telekom AG v Schroeder* [2000] ECR I-743 and Joint Cases C-270 & 271/97 *Deutsche Post AG v Elisabeth Sievers and Brunhilde* [2000] ECR I-929. See Case C-185/97 *Coote* [1998] ECR I-5199, para.23. According to the principle of equality, similar situations should not be treated differently and different situations should not be treated equally, except if such treatment is objectively justified. See Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, para.35.

[43] Case C-184/99 *Grzelczyk* [2001] ECR I-6193. Case C-224/98 *D'Hoop v Office National d'emploi*, [2002] ECRI-6191, Opinion of AG Geelhoed paras.27-32. The Court asserted an EU-wide right for students to loans and grants in cases C-209/03 *The Queen (on the applicaton of Dany Bidar) v London Borough of Ealing, Secretary of Education and Skills* [2005] ECRI-2119 and in C-147/03 *Commission v. Austria*, judgment of 7.7.2005, not yet reported.

[44] Case C-101/01 *Bodil Lindqvist* [2003] ECRI-12971.

The jurisprudence on fundamental rights as part of Community law principles is important in examining how the Court created an institutional duty of obedience and observance of the rule of law. Drawing on the case of *T.Port*, Weiler and Fries maintain that the Court has moved beyond the prohibition of measures which in themselves violate human rights and has set a positive duty on EC institutions to take positive action to comply with fundamental rights.[45] The most recent case law on the right of access to documents – enshrined also in Article 255 EC – may provide a clearer indication as to the true extent of the institutional duty. In *Hautala*, the CFI held that Article 4(1) of Decision 93/731, which provided exceptions to access relating to the protection of public interest, was to be interpreted as meaning that the Council was obliged to examine whether partial access should have been granted to documents covered by one of the exceptions mentioned in that provision.[46] The CFI concluded that as the Council had not examined whether the right of access applied not only to documents as such but also to the information contained in them, the decision to refuse access to the documents in question was vitiated by an error of law and had to be annulled. This interpretation was expressly confirmed by the ECJ on appeal.[47] Subsequently,[48] the Court of Justice annulled a Council and Commission decision – overturning a CFI ruling - refusing access to documents as the institutions had not considered the possibility of granting partial access, because they took the view that the Code and the Decisions on the right of access did not impose such an obligation on them.

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[45] Case 68/95 *T.Port* [1996] ECRI-6065, para.40: 'The Community institutions are required to act in particular when the transition to the common organisation of the market infringes certain rights protected by Community law, such as the right to property and the right to pursue a profession or trade activity' in J.H.H.Weiler and S.Fries, op. cit. n.33. P.Beaumont argues that this single example provided by J.H.H.Weiler and S.Fries is not enough evidence that the Court has created a duty on the institutions to take certain positive action to comply with fundamental rights: 'Human Rights: recent developments and Impact on Law in Europe', in *Convergence and Divergence in European Public Law*, op.cit. n.35.

[46] Case T-14/98 *Hautala v Council* [1999] ECR II-2489, para 87. The CFI further said that an institution is obliged to assess in a concrete and individual manner whether exceptions to the right of access apply to each of the documents referred to in a request. Only such an examination can enable the institution to assess the possibility of granting the applicant partial access. It then concluded that where an institution receives a request for access under Regulation No 1049/2001 it is required, in principle, to carry out a concrete, individual assessment of the content of the documents referred to in the request: Case T-2/03 *Verein für Konsumenteninformation* v *Commission*, judgment of 13.4.2005, paras.72-4, not yet reported.

[47] Case C-353/99P *Council v Hautala* [2001] ECRI-9565, paras.27 and 31.

[48] In Case C-353/01P *Olli Mattila v Council* [2004] ECRI-1073, appeal from Case T-204/99 *Mattila v Council and Commission* [2001] ECR II-2265.

As explained by AG Leger in *Olli Mattila*,[49] and approved by the ECJ, by virtue of the principle of legality and as part of settled case-law, the internal legality of a measure refusing access must be assessed on the basis of facts and law as they stood at the time of the adoption of the measure and not subsequently.[50] The rule is intended to ensure that the European Community functions as a Community of law and that the institutions exercise their powers in compliance with that law. The Community judicature is not entitled, when exercising judicial review of legality under Article 230 EC, to take the place of the institutions by specifying the measures needed to comply with its judgments or to issue directions to those institutions.[51] It is up to the institutions, under Article 233 EC, to provide the remedy, but the Court suggested that the right path was the reopening of communication between the institutions and the applicant, in order to provide the reason for refusal.

Consistent with its case law, the Court seems to draw an analogy between the right of access with the duty to give reasons.[52] When a reply confirms the rejection of an application on the same grounds, the Courts would review the sufficiency of the reasons given in the light of all the exchanges between the institution and the applicant. In this context, the onus on the institution to show that it satisfied the requirement to give reasons may be more stringent where the applicant puts forward factors capable of casting doubt on whether the first refusal was well founded. The institution would then be obliged, when replying to a confirmatory application, to state why those factors were not such as might warrant a change in its position. Otherwise, the applicant would not be able to

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[49] Opinion of AG Leger in Case C-353/01P, ibid, paras.52-5.
[50] Joint cases 15/76 and 16/76 *France v Commission* [1976] ECR 321, para.7. Case C-449/98P *IECC v Commission* [2001] ECRI-3875, para.87.
[51] Opinion of AG Leger in Case C-353/01P, op.cit. n.48, para.30. See Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, para.23. Case C-199/91 *Foyer Culturel du Sart-Tilman* v *Commission* [1993] ECRI-2667, para.17. Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECRII-3141, para.53. Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECRII-2427, para.17. The limitation also applies in the context of an appeal: Case C-5/93P *DSM v Commission* [1999] ECRI-4695, para.36 and Case T-106/99 *Meyer v Commission* [1999] ECRII-3273, para.21.
[52] Case C-353/01P, op.cit. n.48, paras.31-2. Case T-105/95 *WWF UK v Council* [1997] ECRII-313, paras.65-6 and the case law contained therein.

understand the reasons for which the author of the reply to the confirmatory application had decided to confirm the refusal on the same ground. [53]

5.2.2.1 The institutional implications of the EU Charter of Fundamental Rights

Has the EU Charter of Fundamental Rights (EU Charter)[54] affected the institutional position of the Community Courts *vis-à-vis* the other EU institutions? The EU Charter does not explicitly say that it is concerned with violations of fundamental rights arising out of measures adopted by the EU institutions. It simply states that its provisions are addressed to the EU institutions (and the Member States). The institutions shall therefore respect the rights, observe the principles and promote their application in accordance with their respective powers. The EU Charter does not create any new EU competence or institutional powers, including any new jurisdiction for the Community courts.[55] The position has not changed under the Constitutional Treaty, as the Convention was not mandated to propose changes to the very character of the Union. Therefore, the EU Charter was not designed to convert the Union into a general human rights organisation. That would have entailed a huge expansion in the competences of the Union.[56] Neither shall the Union's potential accession to the ECHR affect its competences as defined in the Constitution.[57]

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[53] Case T-188/98 *Kuijer v Council* [2000] ECRII-1959, paras.44-6.
[54] OJ2000, C364/1, 18.12.00.
[55] Article 51 of the EU Charter.
[56] According to Article II-191(2) TeCE, the EU Charter does not create any new EU competence, powers and tasks. According to Article II-191(1) TeCE, the scope and application of the EU Charter is to be limited to actions of the EU institutions only when implementing law and is not intended to replace other forms of fundamental rights protection. According to the Working Group's common understanding, the legal scope of the Union's accession to the ECHR would be limited to issues in respect of which the Union has competence. It would not lead to any extension of the Union's competence, let alone the establishment of a general competence on fundamental rights. Accordingly, 'positive' obligations of the EU to take action to comply with the ECHR could arise only to the extent such action is permitted under the Treaty: CONV 354/02, Final report of the Working Group II 'Incorporation of the Charter/accession to the ECHR', 22.10.2002.
[57] Article I-9 TeCE.

At present, the EU Charter is just a political declaration that reaffirms the protection of rights resulting from the treaties, the ECHR and the ECJ's jurisprudence. As the proclaimed aim of the European Council was not to alter the substance of fundamental rights protection in the EU but to make the already existing protection clearer to the citizens, there seems to be a wide consensus among commentators that it consolidates existing law in the form of a 'confirmation' rather than create a legal basis as such.[58] Seen in this light, the Charter would mainly serve as an additional instrument of constitutional control over the EU institutions. The Constitutional Treaty, if and when ratified, will formally incorporate the EU Charter to the primary law of the EU, but will not modify the substance of protection. This is consistent with the aim of the Convention to make only technical drafting adjustments to the text agreed by the Convention on the EU Charter.[59] Therefore, the legal force of the Charter would not affect the standard of protection.

Would a legally binding Charter lead to a change in the direction of protection, that is, to a reorientation of human rights protection from economic to social? It can be argued that the main legal consequence would be a possible shift in balance between fundamental rights and economic freedoms in EU law, as the EU Charter grants *fundamental* status to civic, political and social rights but not to the four economic freedoms. This may shift the scope of what could be constitutionally mandated by EU law as exceptions to economic freedoms and hence provide critical guidance to the Courts.[60] It is unlikely to lead to the establishment of different economic and social policies as both the current treaties and the Constitutional Treaty are largely market oriented.

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[58] A.J.Menendez 'Legal Status and Policy Implications of the Charter', ARENA WP02/7. E.Vrances 'The Final Clauses of the Charter of Fundamental Rights' EloP 7/03. FG Jacobs, 'The EU Charter of Fundamental Rights', in *Accountability and Legitimacy in the EU*. A.Arnull and D.Wincott, OUP, 2002. N.Bernard, '"New Governance" Approach to Economic, Social and Cultural Rights' and M.P.Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union', in *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* T.Hervey and J.Kenner (eds), Hart Publishing, 2003, pp.271-2.

[59] The idea behind this choice was not to impair the legitimacy of the Convention that negotiated the EU Charter: CONV 354/02, op.cit. n.56. Preamble to Part II TcCE.

[60] A.J.Menendez, 'Between Lacken and the Deep Blue Sea. An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint', (2005) 11 EPL 105-143, pp.138-139.

Most notably, it is arguable that the EU Charter will need to be incorporated into the Treaty to have legal effect or policy impact, as it has already provided normative guidance and a shift in the burden of argumentation to the opinions of Advocate Generals (AGs)[61] to the ECJ and to the CFI. This argument is supported by the practice of AGs who have invoked the text of the EU Charter as authoritative evidence of EU law.[62] In addition, the CFI was prepared to vest the EU Charter with a degree of constitutional stature, when it held in *max.mobil*[63] that complaints regarding infringement of competition rules should be treated

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[61] AG Geelhoed in Case C-491/01 *The Queen v Secretary of State for Health ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* supported by *Japan Tobacco Inc. and JT International SA* [2002] ECRI-11453, para.106 seems to be pointing to this direction: 'Proceeding on the assumption that a national measure such as that outlined in the preceding paragraph is justified by Article 30 EC, this will already mean that the barrier to trade exists. In order to set aside this barrier to trade, the Community legislature is entitled to adopt measures by which it takes over from the national legislature the protection of the matter of public interest (in casu, public health). In other words, the realisation of the internal market may mean that a particular public interest - such as here public health - is dealt with at the level of the European Union. In this the interest of the internal market is not yet the principal objective of a Community measure. The realisation of the internal market simply determines the level at which another public interest is safeguarded.'

[62] Particular reference should be made of *BECTU*, a UK case concerning the right to paid annual leave, where AG Tizzano noted: 'Admittedly ... the Charter has not been recognised as having genuine legislative scope in the strict sense ... the fact remains that it includes statements which appear to reaffirm rights which are enshrined in other instruments ... I think therefore that in proceedings concerned with the nature and scope of a fundamental right the relevant statements of the Charter cannot be ignored; in particular we cannot ignore its clear purpose of serving where its provisions so allow as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definite confirmation of the fact that the right to paid annual leave constitutes a fundamental right'. Although he acknowledges that the text is formally not binding, AG Tizzano appears to give considerable weight to the Charter when indicating the way in which one should solve the case at hand. Having referred to Article 31(2) of the Charter as 'even more significant' legal evidence to other legal resources, he concludes that the *Working Time Directive* should be interpreted as not requiring such a minimum period of employment to acquire the right to paid annual leave: Case C-173/99, op.cit. n.41, paras.26-8. E.Vranes and FG Jacobs, op.cit. n.58. Most references are rather modest, where the Charter is cited as 'additional' legal authority to support legal argument. Reference to principle of fair hearing/presumption of innocence as fundamental right enshrined in ECHR and Article 48(1) of the Charter: Opinion of AG R-J.Colomer in Case C-338/00P *Volkswagen AG v Commission* [2003] ECRI-9189, para.94. Or the necessity to make a double reference to treaty provisions and charter provisions, for instance, in the need to reaffirm and highlight the fundamental right of equal treatment as a fundamental legal principle in employment relationships: Opinion of AG Geelhoed in Case C-256/01 *Debra Allonby* [2004] ECRI-873. Principle of legality has the status of a fundamental right as laid down in national legal order, the ECHR and Article 49 of the EU Charter: Opinion of AG Geelhoed in Case C-58/02 *Commission v Spain* [2004] ECRI-621, paras.39-40. On a more interesting note, AG Leger founded the claim that 'the European Union and its Member States are based on the principle of the rule of law' on the Preamble of the Charter: Case C-309/99 *Wouters* [2002] ECRI-1577.

[63] Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECRII-313, paras.48 and 57, set aside by the ECJ in Case C-141/02 *Commission v T-Mobile Austria GmbH* (previously known as max.mobil Telekommunikation Service GmbH) [2005] ECRI-1283. T-198/01 R1 op.cit. n.58, para.85.

impartially by the Commission during formal investigation as a matter of sound administration, which is one of the general EC principles confirmed in Article 41(1) of the Charter; the fulfilment of that obligation must be amenable to judicial review. It stated: 'Such judicial review is also one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States as is confirmed by Article 47 of the Charter under which any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.'

Further, in *Kyowa Hakko Kogyo Co. Ltd* and *Archer Daniels Midland Company*[64] the CFI defined the scope of application of the principle *non bis in idem* by reference to Article 50 EU Charter, which provides that no one may be tried or punished again in criminal proceedings for an offence he has been acquitted or already convicted within the Union, in accordance with the law. Independently of whether the provision has binding legal force, the CFI held that the EU Charter is clearly intended to apply only within the territory of the Union and the scope of the right laid down in that provision is expressly limited to cases, where the first acquittal or conviction is handed down within the Union.[65]

As long as the EU Charter remains, irrespective of its force, a consolidation of existing law and, thus, authoritative evidence of the law in force, the rights declared therein only have legal meaning if they already existed in the system of protection, for instance, in the Court's jurisprudence.[66] Apart from that, the Charter provides a catalogue of rights and principles in a more consistent and transparent manner, arguably constructing a European 'awareness' of such rights and principles. As it is not intended to affect the competences of the EU institutions and their allocation, it is equally unlikely to affect the ECJ's position. A legally binding Charter, however, would mean constitutionalisation of fundamental rights protection brought about by a political and institutional process beyond the institutional control of the Court. According to Article II-

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[64] Case T-223/00, op.cit. n.40, para.104 and Case T-224/00 *Archer Daniels Midland Company v Commission* [2003] ECRII-2597, para.93.
[65] Case T-67/01 *JCB Services Ferries v Commission*, [2004] ECRII-49, para.36.
[66] F.R.Llorente, 'A Charter of dubious utility', (2003) 1 Int J Constitutional Law 405-426, p.423.

112(5), in its interpretative task, the Court will have to give due regard to the explanations provided by the two Conventions (the Convention on the EU Charter and the Constitutional Convention). Still, it is unlikely that it will deter the Court from its typical systematic interpretation of the Treaties, even to occasionally give prominence to political rights,[67] and there are doubts that the Court will ever develop the political and moral clout to creatively interpret the already ambitious social and political rights enshrined in the EU Charter, for instance, to construe the 'right to life' (Article II-62) to maintain a prohibition of abortions in Ireland.

As for the potential impact of the accession to the ECHR on the autonomy of EU law, including the position and autonomy of the ECJ, it shall not affect the Union's competences as defined in the EU Constitution including the primacy of EU law.[68] There is the theoretical possibility that any interpretation of the EU Charter on the basis of the ECHR - many Charter rights are based on the ECHR – may determine a standard of protection that would diverge from the case law of the Court and would create two competing regimes for the protection of fundamental rights in the EU, thus establishing an 'external control' of EU institutional and legislative activity.[69] On closer inspection, there are sufficient guarantees in the TeCE that any rights protection would remain within the limits of the Treaty without preventing EU law from providing more extensive protection (Article II-112). Also, that the ECJ would remain the sole supreme arbiter of questions on EU law and the validity of Union acts.[70] The Court would have, of course, to rethink its relationship to the Strasbourg Court (ECHR).

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[67] For instance, the Court viewed the free movement of goods and the freedom of assembly and association as being of equal constitutional ranking: Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECRI-5659. A.J.Menendez, op.cit. n.60, p.139.

[68] Articles I-9 and I-6 TeCE. That was the conclusion reached and the recommendations made by the Group, Accession to the ECHR would give citizens analogous protection vis-à-vis acts of the Union as they presently enjoy vis-à-vis all the Member States. This is seen as an issue of credibility as the adherence to the ECHR has been made a condition for membership for new states in the Union. CONV 354/02, op.cit. n.56.

[69] A.Arnull, 'From Charter to Constitution and Beyond: Fundamental Rights in the EU', (2003) P.L. 774-793, p.781.

[70] According to Article III-375 TeCE, Member States undertake not to submit a dispute concerning the interpretation of application of the Constitution to any method of settlement other those provided for therein.

Despite the limited projected impact of the EU Charter on the Court's institutional position and contrary to AG and CFI practice, as well as predictions by the EU institutions that the Charter would become mandatory through judicial interpretation as part of the general law principles,[71] the ECJ has not sought inspiration in it, as it already does with other fundamental rights instruments. Presumably, the ECJ is quite cautious to apply the Charter in its judgments due to its political nature. No longer wishing to assume the constitutional leadership of the EU, it may believe that the steps to the Charter's constitutionalisation must be taken by the political institutions.[72] Besides, AGs have invoked the Charter in several cases, but they have done so in various ways which do not necessarily imply express recognition of any legal force. But a different reading is also possible; by non-reliance on Charter in its human rights jurisprudence, the ECJ asserts its authority in a new pluralist institutional environment of fundamental rights protection which is emerging and which uses the Charter as a reference standard. The Commission has insisted that the binding character of the Charter as a codification of the EU *acquis* in the field of human rights should not depend on its formal incorporation into the treaties.[73] Since 2000, the EP's annual report on the situation of fundamental rights in the Union uses the Charter as its main source of reference and as the authoritative template on which to base its examination of the evolution of fundamental rights in the Member States. The adoption of the Charter - in any form - has encouraged the development of political forms of human rights monitoring, like the Network of Independent Experts on Fundamental Rights, established by the Commission in 2002, or, most notably, the EU Human Rights Agency, an institution with legal personality that is to operate across pillars in promoting civil and political rights.[74] The main argument for the creation of such a body was to encourage the Union and its

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[71] COM(2000) 644 Communication from the Commission on the legal nature of the Charter of Fundamental Rights of the EU, 11.10.00, paras.9-10: 'it is reasonable to assume that the Charter will produce all its effects, legal and others, whatever its nature. [...] it is clear that it would be difficult for the Council and the Commission, who are to proclaim it solemnly, to ignore it in the future in their legislative function...'

[72] R.Lawson, 'Human Rights: The Best is Yet to Come', (2005) 1 ECLR 27-37, p.28. M.P.Maduro, op.cit. n.58, pp.283-4. Jo Shaw, 'The Treaty of Nice: Legal and Constitutional Implications', (2001) 7 EPL 195-215, p.199.

[73] COM(2000)644, op.cit. n.71.

[74] To replace the existing European Monitoring Centre on Racism and Xenophobia EUMC and will become operational by 2007: COM(2005)280 Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, Brussels, 30.06.2005.

institutions to adopt a more preventive approach to human rights instead of human rights being monitored *post hoc* by the possibility of judicial review in the event of violation.[75] And in this environment, it is not possible to predict with certainty the breadth of the Court's future role in fundamental rights adjudication.

5.2.3 Access to judicial review

It has been repeatedly stated in this chapter that the Community courts are prepared to review measures taken by the institutions to uphold the fundamental rights of individuals, as part of their institutional duty to ensure that the rule of law is observed. One fundamental human right, settled in the case law, is the right to effective legal protection,[76] a particular aspect being the right of access to judicial review by individuals. The Court of Justice is prepared to review any act, whatever its nature and form, on condition that it is intended to produce legal effects.[77] One would assume that it will not review recommendations, opinions, interinstitutional agreements and any other instruments of soft law, as for instance, the attempt to annul the declaration that the Maastricht Treaty had come into force. In *Roujansky* the action was simply rejected on the basis that there was no jurisdiction to annul acts of the European Council under the EU Treaty.[78]

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[75] P.Alston and O.de Schutter (eds), *Monitoring Fundamental rights in the EU-The Contribution of the Fundamental Rights Agency*, Hart Publishing, 2005, pp.2, 5 and 18.

[76] The European Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether their acts are in conformity with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions: Case C-314/91 *Weber v Parliament* [1993] ECRI-1093, para.8; Joint Cases T-377/00, T-379/00, T-380/00, T-260/01, T-272/01 *Philip Morris International* [2003] ECRII-1, para.122; Joint Cases T-116/01 & T-118/01 *P&O European Ferries v Commission* [2003] ECRII-2957, para.209; Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission*, judgment of 21.09.2005, para.26, not yet reported.

[77] For instance, Case 60/81 *IBM v Commission* [1981] ECR 2639 and Case 22/70 *Commission v Council* [1971] ECR 263, para.3. N.Bernard, op.cit. n.58, p.256.

[78] Case T-584/93 *Roujansky v Council* [1994] ECRII-585. J.Usher, 'Assertion of Jurisdiction by the ECJ', in *Asserting Jurisdiction*, P.Capps, M.Evans and St.Konstadinidis (eds), Hart Publishing, 2003, pp.287 and 292. Article 46 TEU excludes the Court's jurisdiction on matters falling under the intergovernmental pillars.

Yet, the Court did not hesitate occasionally,[79] while reviewing the application of Community acts, to extend its jurisdiction to measures adopted under the Union pillars which would interfere with fundamental Community principles on the ground of preserving the *acquis communautaire*, probably prompted by Article 47 TEU which appears to grant the ECJ the role of the guardian with regard to the respect and observance of the EC Treaty.

For Christopher Lord legal accountability possesses two main elements: 'the rules must be enforceable by an independent judicial authority' and the legal system must allow 'any citizen on the basis of equality' to access a court 'with a complaint that power-holders are seeking to evade or distort the rules by which they are themselves brought to account'.[80] While the independence of the court structure is beyond doubt, a somber mood prevails over the issue of standing for individuals to challenge general Community measures. Whilst the Court made a bold move in granting the EP standing when that was not envisaged by Article 230 EC for the sake of institutional balance – as seen in s.5.2.1 - it has construed very restrictively the *locus standi* requirement for private litigants, rendering it very difficult for them to obtain a remedy when adversely affected by a Community measure, that is, the outcome of the legislative process. To be more precise, Article 230(4) states that a natural or legal person only has standing to challenge decisions that are of direct and individual concern to them. According to the formula first laid down by the Court in *Plaumann*,[81] persons may be found

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[79] In Case C-124/95 *The Queen, ex parte Centro-Com v HM Treasury and Bank of England* [1997] ECRI-81, the Court stated that powers retained by Member States in the field of foreign and security policy had to be exercised in a manner consistent with Community law and, in particular, with the provisions adopted by the Community in the sphere of common commercial policy under Article 133 TEC. The Court rejected the UK's argument that competence in the field of CFSP suggested also that Member States had more leeway in interpreting, applying, or supplementing Community acts with a foreign and security policy dimension. The undisputed powers under the second pillar had still to be employed in accordance with Community law. Even if Member States were competent to implement UN sanctions beyond the limits of the EC Regulation (Sanctions Regulation), that competence should be always exercised in such a way as not to contradict the basic aims and purposes of the Regulation. See also Case C-177/95 *Ebony Maritime and Loten Navigation v Prefetto della Provincia di Prindisi and Others* [1997] ECRI-645 and Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECRI-3953.

[80] C.Lord, *Democracy in the EU*, Sheffield Academic Press, 1998, p.96. C.Harlow, op.cit. n.4, p.148-9.

[81] Case 25/62 *Plaumann v Commission* [1963] ECR 95 and more recently Case C-451/98 *Antillean Rice Mills* [2001] ECRI-8949, para.49. Normally, a person has to demonstrate membership of a closed class of affected persons: Case 106-107/63 *Toepfer v Commission* [1965]

individually concerned, if a measure affects them by reason of certain attributes peculiar to them or by reason of circumstances which differentiate them from all other persons.

Where individuals have the right to participate in the legislative process, they may be granted standing on the ground of democracy. In *UEAPME*, a challenge to the Parental Leave Directive, the CFI asserted that agreements reached through the social dialogue, which are incorporated into directives, may be challenged on grounds of their democratic legitimacy.[82] It then held that a breach of the principle of democracy should be considered as a possible ground for the annulment of a directive in an action brought by a private party. In this case, the applicant was not found entitled to participate in negotiations for the adoption of the framework agreement on parental leave, later implemented by the contested Council decision, because Articles 3 and 4 of the Agreement on Social Policy did not confer on any representative of management and labour, whatever the interests purportedly represented, a general right to take part in any negotiations entered into, although it was open to any representative to initiate such negotiations.[83] Yet, the absence of a right to participate in the negotiation and conclusion of the Framework Agreement was not sufficient in itself to deprive the applicant of standing. The deciding factor was whether the Council and Commission fulfilled their institutional obligation to verify the 'representativity' of the signatories' actions in the proposal and adoption of the agreement. In the absence of such 'representativity', the two institutions had to refuse to implement the agreement at Community level; otherwise, they would have infringed the applicant's rights.[84]

ECR 405. F.Jacob, 'Effective Judicial Protection of Individuals in the EU, Now and the Future' in *The Treaty of Nice and Beyond*, M.Andenas and J.Usher (eds), Hart Publishing, 2003, p.335.

[82] B.Bercusson, 'Democratic Legitimacy and European Labour Law' (2002) 28 ILJ 153-170, p.153.

[83] Despite initial consultations with the Commission, only those social partners that actually express the willingness to start negotiations have the right to participate. Under the Agreement, cross-industry organisations can negotiate and conclude an agreement and then request the Commission that it be implemented by a Council decision on a proposal from the Commission: Case T-135/96, op.cit. n.10, paras.78 and 89. Agreement on Social Policy (ASP) concluded between the Member States (apart from Britain and Ireland), annexed to Protocol (No.14) annexed to the Treaty in 1996. The ASP is now part of Articles 138 and 139 EC.

[84] Case T-135/96, ibid, paras.78, 83, 88 and 90.

The CFI's statement that the Commission and Council's participation at the implementation stage had the effect of 'endowing an agreement concluded between management and labour with a Community foundation of a legislative character'[85] coupled with its reluctance to review the legality and representativity of the agreement itself, seems to accept a lesser institutional status and a constitutional role for other institutional actors in the legislative process. The CFI's over-emphasis on the 'sufficient representativity' during the implementation stage in establishing standing has been criticised as evading the real issue: in theory, an applicant would have had the right to prevent an agreement being implemented, but not the more fundamental right to contest the legality of the agreement itself.[86]

The CFI rejected later in *Emesa Sugar* the applicant's plea, referring to *UEAPME*, that the contested decision escaped all democratic scrutiny, as there had been no consultation with either the EP or the overseas countries and territories (OTCs). The CFI concluded that no provision of Community law required the Council, in reviewing the OTC Decision, to follow a procedure during which the applicant would have had the right to be heard, thus conferring on them standing. The fact that the contested decision escaped all democratic scrutiny could not give rise to non-application of the rules of admissibility laid down in Article 230(4) EC.[87]

That later case seems to be more in line with the Courts' rejection of the reliance by individuals on institutional balance - a 'principle' judicially proclaimed as intrinsic to the principle of democracy - as a ground of review. In *FNAB*, the appellants submitted that they were entitled to seek the annulment of a measure

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[85] Ibid, para.88.

[86] P.Syrpis, 'Social Democracy and Judicial Review in the Community Order', in *The Future of Remedies in Europe*, C.Kilpatrick, T.Novitz and P.Skidmore (eds), Hart Publishing, 2000, pp.258-63.

[87] Case T-43/98 *Emesa Sugar v Council* [2001] ECRII-3519, paras.45 and 55-6. The CFI emphasised in *UEAPME*, Case T-135/96, op.cit. n.10 at para.89, that 'the principle of democracy on which the Union is founded requires – in the absence of the participation of the EP in the legislative process- that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council ... with a legislative foundation at Community level. In order to make sure that the requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative'.

which undermined a fundamental right inherent in the principle of democracy, that is, the European Parliament's right as elected body to participate in decision-making. The CFI at first instance had failed in its duty to raise the issue of infringement of an essential procedural requirement, as the Council adopted the contested measure without consulting the EP afresh. Also, invoking a breach of procedural guarantees found in the Treaties was enough to grant them standing, irrespective of whether they were 'directly and individually concerned' by the act. The rationale being, the alleged breach of the rule of law had severe consequences for respect for the fundamental rights of individuals. The ECJ rejected those pleas and concluded that the alleged infringement of an essential procedural requirement was not sufficient in itself to allow the applicants access to judicial review.[88] It stated emphatically that its conclusion in *Meroni*, that the balance of powers constituted a fundamental guarantee for the institutional structure granted by the Treaty, could not be interpreted as providing a remedy for any natural or legal person who considered that an act of a Community institution had been adopted in breach of the principle of institutional balance, regardless of whether the act in question was of direct and individual concern to that person. The *Meroni* judgment was rather based on the need to ensure continuing institutional equilibrium and judicial supervision of the Parliament's prerogatives; therefore, it was not relevant to questions on standing.[89]

In *Philip Morris*,[90] the applicants claimed that a Commission decision granting itself power to bring legal proceedings before a Court in a non-Member State breached institutional balance and thereby produced legal effects on the division of powers for which the Treaty provided. Therefore, no such act could escape judicial review. The CFI declared that the Commission's alleged lack of powers

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[88] Order C-345/00P *FNAB v Council* [2001] ECRI-3811, appeal against T-268/99 *FNAB v Council* [2000] ECRII-2893 under Article 230(4), which dismissed for partial annulment of a Council regulation, paras.35 and 37.

[89] Ibid, paras.41-2. Case 9/56, op.cit. n.11, p.152. See also Case C-282/90 *Industrie en Handelsondernerning Vreugdenhil v Commission* [1992] ECRI-1937, paras.20-21. The Court was confronted with arguments that the Commission had acted in breach of the division of powers between the institutions. It held that 'the aim of the system of the division of powers between the various Community institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained and not to protect individuals' and that consequently, 'a failure to observe a balance cannot be sufficient on its own to engage the Community's liability towards the traders concerned'.

[90] *Philip Morris*, op.cit. n.76, paras.52-4 and 85-7.

and any undermining of institutional balance resulting therefrom were not sufficient to render the contested act reviewable. It reiterated that, following precedent, the seriousness of the alleged infringement by the institution concerned or the extent of its adverse effect on the observance of fundamental rights could not justify an exception to admissibility rules. Thus, an alleged infringement of the institutional balance could not give rise to actions for annulment laid down in the Treaty. The CFI adopted a line of arguing consistent with the Court of Justice, yet one cannot ignore the fact that it blatantly declined to review the act despite allegations that the adopting institution, the Commission, the guardian of the treaties, had acted *ultra vires* by circumventing EC law procedures, in order to obtain a favourable result, unavailable under Community law. Effectively, a mere plea of illegality is not available to a natural or legal person to challenge a legislative measure.

While the Court attempted to make the judicial protection of individuals as wide as possible – also with the development of principles such as proportionality, equality, legitimate expectations, legal certainty –under Article 230 (4) EC the standing of individuals has been very restrictively, and arguably unfairly, interpreted by the Court to the effect that it limited individuals to challenge Community legislation. This paradoxical situation has been recently acknowledged by AG Jacobs in *UPA*, who expressed concerns about the damage that could be caused to the Union's (democratic) legitimacy and pointed out that this aspect of case law was often regarded as creating a serious gap in the system of judicial remedies established by the EC Treaty.[91] He emphasised that no alternative procedure, referring to the procedures laid down in Articles 288(2) and 234 EC, could adequately protect the individual's right to an effective judicial remedy to contest the legality of a Community measure.[92] In particular, when a measure of general application is challenged in the context of non-contractual liability of the EC institution, the review carried out by the Community judicature does not cover all the factors which may affect the legality of that measure, being limited instead to the censuring of sufficiently

[91] Case C-50/00P *UPA v. Council* [2002] ECRI-6677, paras.37, 60, 86 of the opinion.
[92] Ibid, para.24, expressed also by the CFI Case in T-177/01 *Jego-Quere v Commission* [2002] ECRII-2356, paras.45-7 and by AG Jacobs in his opinion in Case C-263/02 P *Commission v. Jego-Quere*) [2004] ECRI-3425, paras.23-4.

serious infringements of rules of law intended to confer rights on individuals.[93] As for indirect challenges under Article 234, national courts are not competent to declare EC measures invalid, rendering them inappropriate fora for such cases.[94] Consequently, AG Jacobs proposed a new test on standing: 'a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has or is liable to have, a substantial adverse effect on his interests'. The new requirement is said to improve judicial protection as individuals directly and adversely affected by a measure will never be left without judicial remedy.[95]

The CFI accepted the new approach; in view of the need to ensure effective protection of legal rights for European citizens and businesses, a 'natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly, if the measure in question affects his legal position in a manner which is both definite and immediate by restricting his rights or by imposing obligations on him'.[96] The CFI referred to Article 47(1) of the EU Charter to support a new interpretation of Article 230(4) EC. Access to the courts was to be treated as one of the essential elements of the Community based on the rule of law and was guaranteed by the complete system of legal remedies and procedures designed to permit the review of the legality of acts adopted by the institutions. The ECJ, although it noted that individuals were entitled to effective judicial protection of their Community rights as a general principle of law, rejected the new test as its effect would be to remove all meaning from the requirement of individual concern set out in Article 230(4). The Treaty had established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions and it would

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[93] The chances of success in an action for damages under Article 288 EC are quite slim. Most of the acts at stake are likely to be concerned with the exercise of significant discretion by the EC institutions and it is likely that the restrictive *Schoeppenstedt* test, requiring a 'sufficiently flagrant violation of a superior rule of law for the protection of the individual', will apply: Case 5/71 *Aktien-Zuckerfabrik Schoeppenstedt v Council* [1971] ECR 975, para.11; Case C-352/98P *Bergaderm and Goupil v Commission* [2000] ECRI-5291, paras.41-3; Case T-155/99 *Dieckman & Hansen v Commission* [2001] ECRII-3143, paras.42-3; Joint Cases C-104/89 & C-37/90 *Mulder and Others v Council and Commission* [1992] ECRI-3061, paras.18-9; Case T-196/99 *Area Cova and Others v Council and Commission* [2001] ECRII-3597.

[94] Case C-50/00P, op.cit. n.91, paras.41-2. Case 314/85 *Foto-Frost* [1987] ECR 4199.

[95] Case C-50/00P, ibid, paras.63 and 102.

[96] Case T-177/01, op.cit. n.92, especially paras.41-4 and 51. The CFI based his reasoning also to Case 294/83 *Les Verts v EP* [1986] ECR 1339, para.23.

not be acceptable to adopt an interpretation of the system of remedies as to bring amendments to current law. It rejected AG Jacobs's interpretation of the effectiveness of the system of remedies (the fact that particular Member States have failed to provide for sufficient legal remedies) and declared that it is for the Member States to establish a system of legal remedies and procedures that will ensure respect for the right to effective judicial protection.[97]

The Opinion in the Discussion Circle in the Constitutional Convention was divided along the same lines as between the ECJ and the AG.[98] The Constitution is a compromise of the divergent opinions. On the one hand, it explicitly protects the right to an effective remedy and imposes an obligation on the Member States to safeguard this right, thus reflecting the *UPA* judgment.[99] On the other hand, it clarifies the type of instruments which non-privileged applicants are able to challenge, while it expands the range of acts to be subject to judicial review to include 'European laws' and 'framework laws'. Article III-365(4) TeCE removes the requirement that private parties must prove 'individual concern' if they wish to challenge a 'regulatory act', rendering the standing test less stringent for this category.[100] Fundamentally, however, the Constitutional Treaty does not change

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[97] In this context, in accordance with the principle of sincere cooperation laid down in Article 10 EC, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act. Case C-50/00P, op.cit. n.91, paras.38-9 and 43-5. Case C-263/02 P, op.cit. n.92, paras.29-30 and 38.

[98] The Convention on the Future of Europe established a Discussion Circle on the Court of Justice, which was given the mandate to explore various issues in relation to the operation of the Community Courts. One group thought that the current wording of the article provided effective judicial protection of litigants' rights, taking into account that these rights were primarily protected by references for preliminary rulings. Rather than changing Art.230(4) EC, these members recommended that the new Treaty include an explicit articulation of the obligation on Member States and their courts to ensure respect for the right of individuals to effective judicial protection. The other group in the Discussion Circle regarded the conditions for admissibility in Art.230(4) EC as too restrictive. The majority of this group was in favour of amending the provision in a way that granted standing more readily to those private parties which were affected by a Community act not requiring national implementing measures. For these applicants the requirement of individual concern was to be removed, while direct concern should be retained: CONV 636/03, Final Report of the Discussion Circle on the Court of Justice, 25.03.2003.

[99] Article I-29(1) TeCE: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

[100] The undefined term 'regulatory act' would seem to refer to 'non-legislative acts' as defined in Article I-33. so no longer need to show that they are differentiated from all others the Plaumann formula A.Ward, 'The Draft EU Constitution and Private Party Access to Judicial Review of EU

the system of remedies established by the EC Treaty. While it makes some improvements to the prospect of initiating proceedings directly in the EU Courts, by creating an exception to the requirement of individual concern in the case of 'regulatory acts', many of the problems that currently arise for private parties attempting to gain direct access to the Community Courts have been preserved.[101] As Rene Barents[102] rightly observes, this distinction creates an odd result. A prohibition contained in a non-legislative act which is of 'direct concern' will be admissible. The same prohibition but contained in a legislative act may only be admissible if of 'direct and individual concern'. So, admissibility depends on the form of the act, a claim contrary to the Court's established case law according to which only the contents of an act are decisive for the interpretation of the requirements of 'direct and individual concern'.

In legal literature, it is generally accepted that the condition of 'direct and individual concern' as interpreted in the case law is too restrictive to provide effective legal protection of individuals against acts of a general nature and consequently, the rules governing actions for annulment of EU measures brought by private parties in the Community Courts have been one of the most controversial areas of EU law. Furthermore, the ECJ's narrow approach to the interpretation of Article 230(4) EC has been widely criticised as too restrictive and less attentive to the merits of the case. Therefore, it has been argued that an individual's right to an effective remedy against Community measures is not comprehensively guaranteed under the EC Treaty.[103] As Angela Ward[104] points out, declining to hear cases on the grounds of *locus standi* alone does little toward the propagation of an impression that the Community judicature presides

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measures', in *EU law for the twenty-first century: rethinking the new legal order*, Vol.1, T.Tridimas and P.Nebia (eds), Hart Publishing, 2004, p.212.

[101] C.Koch, '*Locus standi* of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy', (2005) 30 ELRev 511-527, pp.511 and 519.

[102] R.Barents, 'The Court of Justice in the Draft Constitution', (2004) 11 MJ 121-141, p.134.

[103] A.Arnull, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty', (1995) 32 CMLR 7-49, p.7. R.Barents, ibid, p.130. C.Koch, op.cit. n.101, pp.511-2. A.Arnull, 'Private Applicants and the Action for Annulment since Codorniu', (2001) 38 CMLR 7-52. A.Arnull, 'Editorial: April Shower for Jégo-Quéré', (2004) 29 E.L.Rev 287-288. F.Jacobs, op.cit. n.81, pp.337-340.

[104] A.Ward, 'Amsterdam and Amendment to Article 230: an opportunity lost or simply deferred?', in *The Future of the Judicial System of the EU*, A.Dashwood and A.Johnston (eds), Hart Publishing, 2001, pp.37-9. A.Ward, *Judicial Review and the Rights of Private Parties in EC Law*, OUP, 2000.

over a mature system of constitutional review. This debate is unlikely to abate, even if the moderate constitutional reforms under TeCE come into effect.

Besides, how individually concerned should an individual be when a violation directly affects their fundamental rights, as for instance in the case of *UPA* the basic right of judicial protection? The CFI seems ready to draw legal effects from the Charter even in the absence of formal binding legal value, possibly trying to reinforce its own constitutional position by distancing itself from the policy choices of the Court of Justice. In contrast, the ECJ's scepticism towards the Charter became particularly clear when in *UPA*, a decision where the Court had to decide a question substantially similar to *Jego-Quere*, not only did not support the decision of the CFI, but also did so without any reference to the Charter provision on access to justice that had been referred to by the CFI.[105] The right to an effective remedy is expressly recognised in the EU Charter, Article II-107,[106] as incorporated by the TeCE into primary law. This express recognition could lead the ECJ to assign more importance to the right, should the EU Charter become legally binding. Having said that, and as the Convention Working Group on the Charter has argued,[107] although *locus standi* has a nexus with fundamental rights, it transcends the protection of those rights. Judicial protection must exist for *all* subjective rights beyond the question of the incorporation of the EU Charter into the treaties. It is also a matter with institutional and policy implications and should be weighed against sensitive issue like, for instance, the Court's jurisdiction in Justice and Home Affairs (JHA) presently contained in Articles 68 TEC and 35 TEU, or the limits of judicial control over subsidiarity and institutions like Europol.

The ECJ has committed entirely to the text of the Treaty as far as Article 230(4) is concerned and has clearly set the limits of its jurisdiction. What it has not done is provide an alternative in cases where an applicant is denied judicial protection, as AG Jacobs has done in *UPA*, which would offer a way to rebuild the open-ended language of Article 230 with Union values, i.e. effective legal

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[105] M.P.Maduro, op.cit. n.58, pp.282-3.
[106] 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.'
[107] CONV 354/02, op.cit. n.56.

protection.[108] But most notably, what the Court has not done is offer an objective examination of the facts, as it is accustomed to do when a 'misuse of power' claim arises under the second paragraph of Article 230.[109] Besides, relaxing standing conditions does not necessarily imply a modification of the wording of the Treaty, but simply a liberal interpretation of paragraph 4, which is not unusual in the Court's jurisprudence. Carol Harlow[110] argues that the Courts could alternatively encourage 'public interest actions' which have to rely on individual standing rules, but are brought by interest or pressure groups, such as consumer and environmental groups, claiming to represent the general public or individuals entitled to participate (in these groups) and demand that public bodies come before the courts to account for their use of public power. In the *Stichting Greenpeace*[111] case, for instance, Greenpeace joined with residents and local fishermen to challenge the Commission's funding decision for the construction of power stations in the Canary Islands on ecological grounds. On a strict interpretation of treaty provisions, the CFI ruled the application inadmissible, on the ground that the applicants were not individually affected, but 'in the same manner as any other local resident, fisherman, farmer or tourist who is or might be in the future in the same situation'. Greenpeace appealed,[112] with the public interest argument that environmental interests were by nature common and shared and the rights relating to those interests were liable to be held by a potentially large number of people so that there would never be a closed class of applicants satisfying the criteria adopted by the CFI. An unresponsive ECJ upheld the CFI ruling on the ground that the rights in question were fully protected by the national courts.

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[108] A.Arnull, 'April Shower for Jego-Quere', op.cit. n.103, p.288.

[109] Article 230(2) TEC: 'It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers'. According to settled case-law, a measure is vitiated by misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive, or at least the main, purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case: Case C-285/94 *Italy* v *Commission* [1997] ECRI-3519, para.52; Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECRII-917, para.68.

[110] C.Harlow, op.cit. n.4, pp.150-3. C.Harlow, 'Towards a Theory of Standing for the ECJ', (1992) 12 YEL 213.

[111] Case T-585/93 *Stichting Greenpeace Council v Commission* [1995] ECRII-2205.

[112] Case C-321/95 *Stichting Greenpeace Council v Commission* [1998] ECRI-1651.

The Court's approach may appear reasonable in the context of separation of powers. It means that politically the Court is not willing *in this case* (locus standi) to take initiatives of a legislative nature in view of the frequent treaty revisions. However, the Court's 'limits of competence' argument in *UPA* is not consistent with the liberalisation of the standing requirement in *Codorniu*[113], for example, *or* its dynamic interpretation *in Chernobyl.*[114] Should one read *UPA* as a new element in the Court's move from a 'law-making' status towards a judicial restraint approach? Dominik Hanf[115] offers an interesting insight and an important objection to such an understanding. It appears that the Court's aim was to constitutionalise its own traditional and arguably unnecessarily restrictive interpretation of Article 230(4) in order to insulate this approach from any reform attempt by means of judicial interpretation. In other words, to stall any debate on constitutional reform on the standing requirement triggered or fuelled by its judicial interpretation. It was more of a self-protection in an environment of constant constitutional reform through intergovernmental treaty revision but most importantly through the advent of a new institutional process of treaty revision, the Constitutional Convention. This development signals the entry into the next phase of the European integration process which adopts a new method of constitutional reform: 'the Convention method'. The radical change in the political context since the early 1990s has profoundly affected the ECJ's institutional position in the 'constitutional dialogue'.

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[113] The Court held that 'although it is true that a provision ... is by nature and by virtue of its sphere of application of a legislative nature ... that does not prevent it from being of individual concern to some of them. Natural or legal persons may claim that a contested provision is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons.' Case C-309/89, *Codorniu SA v. Council*, [1994] ECRI-1853.

[114] Case C-70/88, op.cit. n.12.

[115] D.Hanf, 'Taking with "pouvoir constituent" in Times of Constitutional Reform: The ECJ on Private Applicants' access to Justice', (2003) 10 MJ 265-290, pp.284 and 290.

5.3 *Judicial review vs judicial activism*: when the 'judicial' becomes 'political'

The recognition of institutional principles and fundamental rights as part of the Community legal heritage has been a central contribution of the ECJ to the constitutionalisation of the EC legal order, as its use of a 'principles' discourse imposed a constitutional 'ethos' on the EU constitutional system with characteristics quite akin to the liberal democratic traditions shared among the Member States: open government, democracy, rule of law, human rights protection and division of powers, even if in minimalist terms. Each of these implies some sort of basic assumptions which are to regulate institutional conduct during decision-making, as well as its legislative outcome.

Article 220 EC places an absolute duty on the Community courts to 'ensure that in the interpretation and application of the Treaty, the law is observed.' It assumes the existence of a legal order, but tells us nothing about its substantive principles, but for the miniscule reference in the Treaty to the principles found in the constitutional traditions of the Member States and the ECHR, serving as a source of inspiration.[116] The Article grants the Courts the power to say what the 'law' is and effectively the jurisdiction to create 'constitutional doctrine by the common law method', while it includes no reference to any limits on their power or jurisdiction. Read along with Article 230 EC, observance of the law will entail compliance with the Treaty or any rule of law relating to its application; the precise importance of both Articles is that they mandate the Courts to work out a system of legal principles in the light of which the legality of Community (and Member State) action must be reviewed.[117]

The open-ended and deliberately ambiguous text of the Treaty provides no more than a framework within which the legal system is fashioned. In defending those constitutional values which define the EU polity as a distinct legal order, the Court had to give them content and interpretatively shape their substance and

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[116] Articles 6(2) TEU and 288(2) TEC introduced by the Treaty of Maastricht only in 1993.
[117] T.Tridimas, *The General Principles of EC Law*, OUP, 1999, pp.11. K.Lenaerts and P.Van Nuffel, *Constitutional Law of the EU*, Sweet & Maxwell, 1999, p.530.

model the normative structure of the system. The Court had to fashion a 'constitution' of sorts from a Treaty which inevitably contained a number of compromises.[118] The first step taken by the Court in the interpretation of the treaties was to accord EU law a status distinct from that of international law. The move of constructing the Union with its own legal system implied the creation of an entire legal framework that eventually led to the constitutionalisation of the treaties with well-known principles such as supremacy and direct effect, implied powers and human rights. What makes the EU legal order unique is the development by the Court of a constitutional infrastructure with individual rights, enforcement mechanisms, and an institutional rule of law (e.g. separation of powers).[119]

Article 1 TEU signifies the creation of the EU polity in its own right and stresses the importance of cooperation with its citizens. Through the doctrine of direct effect and the recognition of subjective rights, the Court integrated societal actors (legal and natural persons) into the Community legal system. It became legally and politically imperative that a way be found to vindicate fundamental rights at EU level, once legislative competence moved away from national political institutions and national judicial control. It was not until Amsterdam, in 1997, that the Treaty first affirmed respect for human rights and fundamental freedoms as part of the Union's objectives and policies (Article 6(2),(4) TEU), but this has not created any legislative momentum. The Court's jurisprudence was partly a response to the Union's growing capacity to affect fundamental rights to an extent unforeseen in the original treaties that had to be (judicially) controlled, if the rule of law was to be observed. Besides, it did not have to recreate a system as the treaties already provided for the review of the legality of Community acts and the exercise of legislative power.

In this context, the Court has understood its interpretative jurisdiction broadly. As seen in s.5.2, it recognised a variety of rights in its jurisprudence in an incremental expansion of fundamental rights protection. For instance, by

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[118] T.Tridimas, ibid., p.9. H.Schepel, 'Reconstructing Constitutionalisation: Law and Politics in the ECJ', (2000) 20 OJLS 457-468, p.460. J.W.R Reid, 'Political Review of the ECJ and its Jurisprudence', JM WP 13/95.
[119] M.P.Maduro, *We The Court*, OUP, 1998, pp.7-8.

creatively using the concept of 'indirect discrimination', it succeeded in giving a treaty basis to the prohibition of discrimination on other grounds related to nationality or sex. The treaty-based prohibition of discrimination on the grounds of sex was extended by the Court to the prohibition of discrimination on grounds of the fact that someone wishes to change, or has changed their sex.[120] The EU system has been developed under a model of teleological legal construction, especially in the case of institutional principles. Prompted by the eagerness to afford judicial protection to the individual against the exercise of power by the EU institutions and the nature of the legislative process which reflects forms of representative democracy in the shape of the Council and the Parliament, the Court became rhetorically bolder, in some instances without explicit textual support in the Treaty. In *Les Verts*,[121] it extended judicial review to institutions not expressly referred to in the treaties; the rationale being, in a Community based on the 'rule of law', neither the Member States nor the EU institutions could escape judicial scrutiny.

The Court's approach to legal reasoning is not atypical; interpreting treaties on the basis of their spirit and purpose, rather than simply their words, is in fact required in public international law under the Vienna Convention on the Law of Treaties, Article 31(1). In the case of the EU legal order, the need to fill gaps in the system of legal protection is exacerbated by its inimitable and dynamic quality. The founding and amending treaties are moulded by teleology; their aims and objectives, which are in themselves in constant evolution and couched in general terms, provide only the framework, while someone has to develop the core of the legal system. Recourse to principles enables the Court to be responsive to change. Besides, it is inherent in the art of interpretation to 'pronounce' the rule, to some degree make the law. The power of judicial review involves this kind of discretion. The audacious character of the Court's

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[120] Case C-29/95 *Pastoors and Trans Cap* [1997] ECRI-285, paras.17-8. Case C-13/94 *P v S* [1996] ECRI-2143, paras.13-24. The Court however was not prepared to bring discrimination on grounds of sexual orientation: Case C-249/96 *Grant* [1998] ECRI-621, paras.24-47. K.Lenaerts and E.DeSmijter, 'A "Bill of Rights" for the EU', (2001) 38 CMLR 273-300, p.275. T.Tridimas, op.cit. n.98, p.117. T.Koopmans, *Courts and Political Institutions*, Cambridge University Press, 2003, p.221.

[121] A.Arnull, *The European Union and its Court of Justice*, OUP, 1999, Ch 14. S.Weatherill, 'Activism and Restraint in the ECJ', in *Asserting Jurisdiction*, op.cit. n.78, p.260. Case 294/83, op.cit. n.96, para.23.

judgments, at least in the early years, was intended to create a uniformity of application of Community law in different jurisdictions in conformity with the underlying premises of the legal system.[122] To the ECJ, it was necessary to create a common constitutional basis for the achievement of the objectives of the treaties.

It is largely a fiction that the judicial function is to state the law and not to create it, that is, to play a supporting role by applying already established rules. Judicial organs by their nature necessarily carry out a creative task particularly when they have to apply a text of a general nature, which is arguably the case for most constitutions, written or otherwise. In a democratic society, it is not easy to find justification for judicial creativity; the *legislator* is democratically elected, the *judge* is not. To Mark Van Hoecke,[123] this is a very formal approach to the notion of democracy. Indeed, a functioning democracy needs much more than majority voting; it needs a democratic infrastructure. Fundamental rights have acquired greater prominence in all western societies, where the eagerness to hold public authorities accountable and the empowerment of the individual have rendered respect for human rights not only as a *sine qua non* of legality, but as the most important yardstick in assessing a polity's democratic credentials. In the EU, democracy is not exhausted in the majoritarian rule but encompasses 'values' like justice, solidarity and non-discrimination'.[124] Democracy is a delicate balance between majority rule and fundamental rights to which all organs of state are committed. Hence, the accusation that judicial review is incompatible with democracy is not founded. Judicial review provides a system of 'checks and

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[122] T.Tridimas, op.cit. n.117, p.9. S.Weatherill, ibid, pp.256 and 258. T.Koopmans, op.cit. n.120, p.23. M.Shapiro, 'The ECJ', in *The Evolution of EU Law*, P.Craig and G.de Burca (eds), OUP, 1999, p.323.

[123] M.Van Hoecke, 'Judicial Review and Deliberatively Democracy: A Circular Model of Law Creation and Legitimation', (2001) 14 Ratio Juris 415-423, p.416.

[124] These are found throughout the text of the treaties. Also, Article I-2 TeCE provides that these values are common to the Member States in 'a society of pluralism, tolerance, justice, solidarity and non-discrimination'. A.Peters, 'European Democracy after the 2003 Convention', (2004) 41 CMLRev 37-85, p.7. T.Tridimas, 'The ECJ and the Draft Constitution: A Supreme Court for the Union?', in *EU law for the twenty-first century*, op.cit. n.100, p.135. Amaryllis Verhoeven, *The EU in Search of Democratic and Constitutional Theory*, Kluwer Law International, 2002, p.14. M.L.Fernandez-Esteban, op. cit. n.24, p.98-99. As Lisa Hilbink informs us, prominent democratic theorists now agree that democracy is 'as much about opposition to the arbitrary [or unjust] exercise of power as it is about collective self-government'. L.Hilbink, 'Law and Politics in the Madisonian Republic', in *After National Democracy – Rights, Law and Power in America and the New Europe*, L.Tragardh (ed), Hart Publishing, 2004, p.131.

balances' by implementing the rule of law, protecting both 'minorities' and the 'majority'. Setting aside any theoretical discussion on the relationship between rights and democracy, rights protection does appeal to the political systems of the Member States, where constitutional courts have been introduced - in most of them - in order to scrutinise legislation on the basis of constitutionally protected rights.[125] At least in this respect, courts fulfill an important social function.

The process of judicial review is by no means peculiar to the EU legal order. Judicial review of constitutional issues has been implemented continuously in the US since the Supreme Court (SpCt) decision in *Marbury*. The US Constitution did not mention judicial interpretation or confer expressly on judges the power of judicial review, that is, the authority to remedy breaches of the Constitution by the other branches of government. Judicial review emerged in the reasoning of SpCt Judge Marshall in cases such as *Marbury*, where the SpCt held that the power was a necessary implication of the establishment of the Constitution as law by the sovereign people. The legal basis for the power of judicial review was constituted by general acquiescence in judicial law-making.[126] Across Europe, courts have played an active role in deciding important and controversial social questions, traditionally decided by governments and parliaments. Almost all Member States have some sort of system of judicial review or judicial scrutiny in place, where either general courts or constitutional courts safeguard the constitutionality of legislation based on the adjudication of fundamental rights. With this judicialisation of policy-making, Europe seems to be moving closer to the US model of democracy, in which courts have long played an important, although often controversial, role.[127]

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[125] J.Limbach, 'The Concept of the Supremacy of the Constitution', (2001) 64 MLR 1-12, p.3. R.Dehousse, *The European Court of Justice*, MacMillan Press Ltd, 1998, p.117. J.H.H.Weiler, U. Haltern and F.Mayer, 'European Democracy and its Critique. Five Uneasy Pieces', JMWP 1/95.

[126] *Marbury v Madison* (1803) 5 U.S. (1 Cranch.) 137. J.Goldsworthy, 'Raz on Constitutional Interpretation', (2003) 22 Law and Philosophy 167-193, p.169. M.Rosenfeld, 'Constitutional Adjudication in Europe and the United States: paradoxes and contrasts', (2004) 2 Int J Constitutional Law 633-668, p.633.

[127] J.Ferejohn and P.Pasquino, 'Rule of Democracy and Rule of Law', in *Democracy and the Rule of Law*, J.M.Maravall and A.Przeworski (eds), Cambridge University Press, 2003, p.249. D.Chalmers, 'Judicial authority and the constitutional treaty', (2003) 1 Int J Constitutional Law 448-472, p.449. L.Hilbink, op.cit. n.124, p.122.

The German Constitutional Court (BverfG), for instance, will not determine the meaning of individual rights by looking solely to constitutional provisions. The Basic Law (BL) does not only lay down rights, but also enshrines values (e.g. democracy, the social state). Due to the fact that the BL embraces general undefined concepts, the BverfG has an abstract and highly deductive style of reasoning showing little regard to the facts of the case in hand. The 'law' is not purely the outcome of the legislative process; legal principles, particularly those embodying human rights and fundamental guarantees of the rule of law, have a legal value of their own and are regarded *uebergesetzlich*, that is, 'supralegal'. When it comes to the respective judicial and legislative roles, the BverfG has to carry a balancing act between freedom of choice inherent in the act of legislating and the enforcement of values it has to protect. Concepts such as the 'social state' (*sozialstaat*), inherent in the constitution, set certain limits to political institutions, yet do not prescribe how these should be achieved; the legislator will fill in the details.[128] The legislator cannot make new laws that are contrary to those natural law concepts perceptible in the BL and the BverfG assumes the traditional role as the guardian of the rule of law. So, when the BverfG carries out judicial review, judges may not be founding their decision on a specific constitutional provision, but remain faithful to the constitutional system as a whole, which consists of 'norms' and 'principles'.

As the Basic Law, one could argue that EU law is not just a collection of 'statutory' texts but also an accumulation of legal principles which have a value of their own and underpin the constitutional system of the EU. Constitutional adjudication, as in Germany for instance, seems inherently political in the sense that the courts must deliberate not only on a specific constitutional provision, but also on principles that underpin the system. In the Union's constitutional adjudication, the ECJ has been criticised for its active approach to

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[128] Certain constitutional rules cannot be changed at all (Article 79 S (3) BL). T.Koopmans, op.cit. n.120, pp.107-9. Guiding principles are more important than the particular issues of the case. The constitutional Court is more concerned with the incompatibility of legislation with constitutional law, than with the unconstitutionality of the application of legislation to a particular case. It often determines aspect of laws as unconstitutional, but exercises restraint in negating them. It admonishes the legislature but does not declare the measure void. Under some circumstances, if the legislature does not then act the Court sustains the law but warns the legislature that unless certain requirements are met the act may be declared unconstitutional: K.Holland, *Judicial Activism in Comparative Perspective*, MacMillan, 1991, pp.157-8.

constitutionalisation and its lack of judicial objectivity and impartiality with designs to further European integration, a claim that is largely drawn from academic scholarship.[129] In Article 220 EC, an apparent differentiation exists between the 'interpretation and application of the treaty' and the 'law' to be observed. The provision is open-ended and does not prevent rules and principles from being incorporated into the 'law'. To a certain degree, activism is due to the nature of 'rights' that are supposed to be part of EU law which even after the adoption of the EU Charter are part of an imprecise, in terms of boundaries, collection of norms rooted in the common constitutional traditions of the Member States or the ECHR.[130] Besides, because judges value legality both intrinsically and as the principal source of their own authority, they are particularly disposed to take an expansive view of legal requirements and thus an expansive view of their authority.[131] So, activist judicial behaviour may not always be inevitable or deliberate.

Regarding the furthering of the European integration argument, if the Court had been activist in the opposite direction, namely slashing EU powers, would it not have faced the same criticism? Whether the ECJ has been unduly active, depends on the standard of judicial interpretation one takes to be the correct one. For instance, the Court's frequent recourse to contextual and teleological arguments might be offensive to those who favour a 'rulebook' interpretation of law and do not perceive a political role for the judges.[132] The real issue, however, is not about the Court's institutional empowerment as such, but about the content

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[129] The issue has been abundantly revisited elsewhere and in varying degrees based on a wider context of the Court's constitutional activities (not just institutional balance and fundamental rights). One of the most fervent critics of the Court is Hjalte Rasmussen; see H.Rasmussen, *On Law and Policy in the ECJ*, Martinus Nijhoff, 1986 and 'Between self-restraint and Activism: A Judicial Policy for the European Court', (1988) 13 ELRev 28-38. Another critic is Trevor Hartley who suggests, *inter alia*, that a court may be justified in giving judgment contrary to the written law when it applies the doctrines of necessity and natural law. To illustrate his argument he cites the cases of *Les Verts* and *Grogan*, but concludes the ECJ's judgments cannot be justified by the kind of arguments that might apply to courts generally, unless made on the basis of considerations specific to the European Court: T.Hartley, 'The European Court, Judicial Objectivity and the Constitution of the EU', (1996) 112 LQR 95-109, pp.102-3 and T.Hartley, *Constitutional Problems in the EU*, Hart Publishing, 1999, p.41.

[130] R.Barents, op.cit. n.102, pp.125 and 127. F.R.Llorente, op.cit. n.66, p.412.

[131] J.Ferejohn and P.Pasquino, op.cit. n.127, p.258.

[132] J.H.H.Weiler, 'Human Rights, constitutionalism and integration', in *Developing a Constitution for Europe*, O.E.Eriksen, J.Fossum and A.J.Menendez, Taylor and Francis Ltd, 2004, p.60. A.Verhoeven, op.cit. n.124, p.83.

judicial interpretation embraces, whether it has remained within the ambit of the possible interpretations permitted by an open-ended, teleological treaty.

The method of interpretation of fundamental human rights by the Court is at the centre of the debate on judicial activism. What appears to be lacking in its case law is a coherent theoretical and dogmatic explanation of the variation in the standards it uses. Fundamental to the rule of law is the adoption and consistent application of a general methodology of interpretation that is faithful to the content of the antecedent rules. It is difficult to extract some sort of judicial philosophy in the human rights cases of the ECJ, as one can in the US SpCt civil rights jurisprudence, albeit one that has changed over time (e.g. the 50s and 60s Warren era).[133] Still, if one can identify any general theme, this does seem to be economic integration and the fundamental freedoms of EC law have been highly developed to this end. The cases of *Konstantinidis* and *Grogan*[134] are evidence of how the Court favours Community interests over fundamental rights. Individuals will not be able to assert their Community rights on a claim of a *per se* violation of fundamental rights; they will have to establish some kind of economic nexus in order to fall within the protection of EC law. In defence of the Court's economic integration oriented attitude, the subordination of political freedoms to economic ones is not purely a matter of judicial choice, but rather incumbent in the treaties which have been built on economic objectives. With the introduction of European citizenship in the Treaty of Maastricht and the successive treaty revisions to reflect more political rights for Europe's citizens, the Court has followed suit with an ever-increasing adjudication on citizenship.

Another crucial question is how these principles, elaborated by the Court, operate within the EU legal order. Are they binding rules or just guidelines and where do they derive from? The protection given to human rights depends on the interpretation adopted. In *Taking Rights Seriously*, Ronald Dworkin contrasts legal principles with legal rules stipulating that while legal rules operate in an 'all

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[133] R.S.Summers, 'A Formal Theory of the Rule of Law', (1993) 6 Ratio Juris 127-142, p.132. M.P.Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union', op.cit. n.58, p.280. S.Douglas-Scott, *Constitutional Law of the EU*, Longman, 2002, p.458.

[134] Case C-168-91 *Konstantinidis v Stadt Altensteig* [1993] ECRI-1191 and Case C-159-90 *SPUC v Grogan* [1991] 3 CMLR 849.

or nothing' fashion, principles do not. Although they cannot be identified by way of any positivist rule of recognition, principles have a dimension of weight that may bind courts.[135] Unfortunately, the ECJ has given no clear indication as to their status apart from the occasional declaration that it is influenced by the principles found in the common constitutional traditions of the Member States and the ECHR, yet bound by neither.[136] On the other hand, the duty of sincere cooperation, under Article 10 EC, to ensure *inter alia* an effective judicial protection for individuals, may prevent fundamental principles of national legal orders from 'undermining' emergent fundamental principles at EU level.[137] The visible distinction between 'principles' and 'rights' in the EU Charter as well as the proclaimed duty for the Court to give due regard to the explanations provided,[138] may put constraints on its interpretive role in relation to the development of a fundamental rights culture within EU law, should the Charter become legally binding. The extent, as to how far, is not clear, as the Charter also reasserts the rights protection as it results from the case law of the ECJ.

With respect to fundamental rights, the Court's jurisprudence may be justified due to the lack of fundamental rights protection under EU law. With respect to institutional principles, too creative an interpretation of the Union's institutional design is less justified, especially as the division of functions between the institutions is by and large dealt with in the Treaty. Having said that, the Court has a central mandate in the Treaty (e.g. Articles 220 and 230 EC) to ensure that the EU institutions do not exceed their authority. What appears problematic is that, with respect to institutional relations, the Court is particularly activist and often inconsistent. *Chernobyl* and *Les Verts* illustrate that, when deciding which institutions are entitled to bring proceedings for annulment under the Treaty, the

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[135] S. Douglas-Scott, op.cit. n.133, p.452. R.Dworkin, *Taking Rights Seriously*, Duckworth, 2005, pp.24-41.

[136] It reiterated in *Emesa Sugar* case that the ECHR is not binding on the ECJ, but that it has a 'special significance' in the development of the Court's *own* concept of fundamental rights. Case C-17/98 *Emesa Sugar (Free Zone) v Aruba* [2000] ECRI-675, para.8 citing case C-260/89 *ERT* [1991] ECRI-2925, para.41.

[137] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame* [1990] ECRI-2433, para.19. D.Curtin and I.Dekker, 'The Constitutional Structure of the EU: Some Reflections on Vertical Unity-in-Diversity, in *Convergence and Divergence in European Public Law*, op.cit. n.35, p.75.

[138] As prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention: Preamble to the EU Charter and Article II-112(7) TeCE.

Court has adopted a lax reading of the Treaty, or even *contra legem*, to ensure that the evolution in the powers of the EU institutions did not undermine the rule of law and the institutional balance.[139] In *EP v Council*, [140] the Court appeared to question the convenience of its own intervention where it gave no consideration to the Council's motives of adopting a regulation without proper parliamentary consultation, having asked the Parliament's opinion only in a *pro forma* manner at the EP's dismay, which called the consultation 'a mere sham or fiction'. Less than a month later,[141] it intervened to the opposite direction annulling a directive on the matter of transportation due to the lack of reconsultation of the EP. One may take the view that judicial activism can more easily be justified in procedural matters which fall *par excellence* in the judicial province, than in issues of substance.[142] But this appears to be a false distinction. It is very apparent in the Court's jurisprudence how closely the substantive right of access to documents and the procedural duty to give reasoning are connected. Besides, it was in *Roquette* that a direct link between the Parliament's procedural prerogatives and the democratic principle underlying the EU legislative process was established.

It is tempting to simply equate legal accountability with judicial review or control. Richard Mulgan separates law's standard-setting function, regarded as the framework for accountability, from the enforcement procedures. He argues that 'accountability' and 'control' are not identical terms and ought not to be conflated: 'being accountable for alleged breaches of the law does not mean that compliance with the law is also an act of accountability or that the law itself is an accountability mechanism'.[143] Equally, let us not assume that the use of a language of 'principles' translates into a system of legal protection. The process of 'application and interpretation' is also a process of institutional choice; when the Court exercises its function of judicial review, it also ascertains the 'margin of discretion' allowed to the EU institutions during law-making. Interpretation in that context becomes particularly instructive as the expression of judicial policy;

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[139] B.de Witte, op.cit. n.8, p.99. AG Opinion in Case C-50/00 P, op.cit. n.91, paras.69 and 71.
[140] Case C-417/93 *EP v Council* [1995] ECRI-1185, para.8.
[141] Case C-21/94, op.cit. n.20.
[142] T.Tridimas, *The General Principles of EC Law*, op.cit. n.117, p.34.
[143] R.Mulgan, '"Accountability": an Ever-Expanding Concept?', (2000) 78 Public Administration 555 in C.Harlow, op.cit. n.4, p.146.

it tells us what the Court perceives to be its function, what it considers to be the underpinnings of the legal system. The Opinion on the draft EEA Agreement illustrates the importance that the Court attaches to Article 220 and the judicial structure of the Community. It held that Article 238 EEC did not provide any basis for setting up a system of courts which conflicted with Article 220 and more generally with the very foundation of the Community, to the extent that even an amendment to the Treaty, at least as indicated by the Commission, could not cure such incompatibility. The implication of the judgment is that courts are usually given the final interpretative authority of the law.[144] By using institutional principles in its jurisprudence, the ECJ delineated the institutional position of the EU institutions within the EU institutional system. By using fundamental rights, it defined its own institutional position *vis-à-vis* the other EU institutions. So, by incorporating general principles of law into *the law* to be observed, the Court created a constitutional regime of division of powers in an institutional system where control over legislative activity remains central to its mandate.

Does the use of general principles of law in the constitutional adjudication of the EU make a compelling case from a democratic perspective? The Court of Justice (and the CFI) by using the judicial review mechanism has become part of the decision-making process. The right of access to judicial review provides an important avenue of access to this process. The Court's draconian stance on the eligibility of natural and legal persons to institute proceedings and its refusal to let the latter invoke institutional principles as a ground for judicial review hinders public participation in the decision-making process. So, the Court's interpretation of the standing requirement may be true to the text of the Treaty and thus legitimate, but is it democratic? On the other hand, the integration of general principles of law, including the protection of fundamental rights, into *the law* to be observed marked a shift to a more democratic and social conception of the

[144] Opinion 1/91, *Draft Agreement relating to the creation of EEA* [1991] ECR I-6079. As a result of the ruling the draft EEA Agreement was amended and subsequently in Opinion 1/92 [1992] ECR I-2821 the Court held that, subject to certain conditions, the amended version was compatible with the Treaty. T.Tridimas, *The General Principles of EC Law*, op.cit. n.117, pp.33 and 37-8. M.P.Maduro, *We The Court*, op.cit. n.119, pp.15-6.

rule of law.[145] As a result, EU decision-making, to be democratically legitimate, must not only come about in a democratic way in terms of sufficient representation and participation, but should also comply with general principles of law, in particular ensuring respect for and realisation of fundamental rights. At least to this extent, the ECJ has contributed to EU democracy.

5.4 Conclusion

This chapter examined how the Court has used the judicial review mechanism to institutionally position itself in the decision-making process, as it sought procedurally and substantively to control law-making pursuant to its duty to ensure that the 'rule of law' is observed, through its jurisprudence on institutional principles and fundamental rights. The issue of judicial review of EU legislation actually raises issues regarding the margin of discretion allowed to the EU institutions to engage freely in decision-making. Such limitations may be imposed by the Court even beyond the scope envisaged in the treaties. The issue of judicial review also highlights the fact that while the ECJ tries to promote the ideal of 'limited government' by regulating institutional relations, the legislative process and indirectly the content of legislation, it actually blurs the borderline between judicial and political activities.

[145] This is also reflected in the Treaty, Articles 1 and 6 TEU.

CHAPTER 6

EU DECISION-MAKING: PRESERVING OR PERVERTING DEMOCRATIC LEGITIMACY WITHIN THE MEMBER STATES?

6.1 Introduction

Much of the current discussion about the Union's decision-making and democracy is concerned with the EU institutions, rather than with its impact on the democratic systems of the Member States.[1] The aim of this chapter is to examine how EU decision-making impacts on the institutional balance in the internal legal orders of the Member States and how that affects democratic legitimacy to the extent that the least democratic institutions are involved in decision-making. Namely, how EU constitutional rules and the requirements of EU decision-making have influenced the competence exercise of national and subnational actors guaranteed under national constitutions and, subsequently, the balance of powers underlying the government system established therein.

The idea of bringing Europe closer to citizens predominated the parallel post-Nice constitutional reform and the Commission's EU governance debate. While both initiatives aimed, *inter alia*, at increasing the democratic legitimacy of EU decision-making, they provided a different vision of the role of national and subnational actors in the future institutional development of the Union, which in a way unveils the plurality of the Union's institutional system which is not always reflected in formal constitutional arrangements.

[1] N.Neuwahl and S.Wheatley, 'The EU and Democracy – Lawful and Legitimate Intervention in the Domestic Affairs of States?', in *Accountability and Legitimacy in the EU*, A.Arnull and D.Wincott (eds), OUP, 2002, p.223.

6.2 The impact of EU decision-making on the institutional balance in the internal legal orders of the Member States

As has already been examined in Chapters 2 and 3, although legislative and executive powers are not formally separated in the Union's institutional system, the Council is set at the centre of decision-making both as a strong executive and legislator, while, over time, it has come to share legislative and delegated executive powers with the Commission and the Parliament. Participation in the EU decision-making process via the Council has strengthened the Member States governments' position in relation to other sovereign bodies, especially national (and regional) parliaments in the sense that they have acquired normative powers that they would not normally have in their own country without parliamentary control or authorisation.[2] Given the central role of national executives in the EU decision-making process (versus the central role of parliaments in the national legal systems), it could be argued that national parliaments (NPs) see European integration as a threat due to the reduction of their legislative and policy control and the overall decrease in democratic accountability and transparency.

Parliaments appear to be central institutions in national systems of governance. They elect and oversee their governments, approve legislation, amend national constitutions and, as far as citizens are concerned, appear to hold the ultimate power in society. That is because a central aspect of representative democracy is how well the chain of delegation and accountability from voters to elected representatives and to policy implementers actually works. The typical chain of delegation starts from the voters who mandate the members of parliament and has at the other end civil servants that are charged with implementing the

[2] B.Crum, 'Legislative-Executive Relations in the EU', (2003) 41 JCMS 375-395, p.376. C.Botelho-Moniz, 'The Portuguese Constitution and the Participation of the Republic of Portugal in the EU', (1998) 4 EPL 465-478, p.471. D.Dimitrakopoulos, 'Incrementalism and Path Dependence: European Integration and Institutional Change in National Parliaments', (2001) 39 JCMS 405-422, pp.405-6. In the Netherlands, the Constitution requires a basis in an Act of Parliament for all legislative measures affecting citizens, and is considered an important general constitutional principle: L.Besselink, 'The Separation of Powers under Netherlands Constitutional Law and European Integration', (1997) 3 EPL 313-321.

decisions of their predecessors in the chain.[3] Their centrality as institutions and emblems of democratic legitimacy is amply evident in the challenging of the ratification of the Maastricht Treaty. The German *Maastricht* judgment[4] reinforced this position, when it held that it is the peoples of the Member States who, through their national parliaments, have to provide the democratic legitimation for the Union to carry out its sovereign tasks and exercise its sovereign powers.

NPs are involved in the approval of primary EU legislation and play an important role in transposing Community legislation into national law. However, they are not part of the Union's decision-making process *per se*. It is notable that they are not referred to in the core treaties as political or legislative organs. At present, the only constitutional basis for participation in EU decision-making is found in the Protocol on the role of national parliaments in the EU,[5] which precludes any formal participation, but for a mere exchange of views at the outset of the legislative process. Namely, there is an obligation on the part of the Commission to forward consultative documents to NPs and make available legislative proposals in good time to the Member States governments, so that their parliaments receive them as appropriate. So, the role of NPs in the EU affairs is mainly interrogative, dependent on national constitutional practice, the willingness of national governments to involve them, but also on their readiness to hold their governments fully accountable when it comes to the position ministers are to take or have taken at EU level.[6]

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[3] T.Bergman and E.Damgaard (eds), *Delegation and Accountability in European Integration*, Frank Cass, 2000, pp.1, 5 and 16. T.Raunio, 'Two steps forward and one step back? National legislatures in the EU Constitution', Constitutional Online Paper 16/04, The Federal Trust.

[4] D.Obradovic, 'Policy Legitimacy and the EU', (1996) 34 JCMS 191-222, pp.204-5; CMLR [1994] 57, paras. 39-40.

[5] Protocol No.23, annexed to the Treaty of Amsterdam. The COSAC (Conference of the Community and European Affairs Committees of the Parliaments of the EU) is recognised as a body with the right to make any contribution it deems proper for the attention of the EU institutions either on its own initiative or when a specific legislative proposal has been forwarded to it. Such contributions shall neither bind the Union institutions, nor prejudge the position of national parliaments.

[6] K.Lenaerts and E.de Smitjer, 'The Question of Democratic Representation', in *Reforming the TEU – The Legal Debate*, Winter et.al.(eds), Kluwer Law International, 1996, pp.184-5. P.Dann, 'Looking through the federal lens: The Semi-parliamentary Democracy of the EU', JMWP 5/02.

Following changes made by Member States to allow for the creation of EU-specific mechanisms for scrutiny, the extent to which NPs monitor EU decision-making and their governments' participation in it varies from Member State to Member State, while it usually reflects existing institutional repertoires, where the legislative branch may have been traditionally weak in relation to the executive independently of European integration. More precisely, the impact of parliamentary scrutiny differs between those parliaments which are legally able to mandate their governments representatives before a Council decision takes place (e.g. Denmark, Germany, Netherlands) and thus emerge as strong 'national players' in EU affairs and parliaments which have no means for effectively influencing their governments' standpoint in the Council (e.g. Greece, Ireland, Italy).[7] In the UK, the concern over the erosion of the principle of parliamentary sovereignty has led to a process that expanded the UK Parliament's involvement in European affairs, but did not lead to the creation of a totally new mechanism in the sense of a binding parliamentary scrutiny reserve.[8] The two Houses of Parliament utilise the scrutiny committee method to consider draft EU legislation and other documents, arrangements that arguably recognise a non-binding duty on British ministers to avoid giving their agreement in Brussels before the end of the parliamentary scrutiny of a document. The scrutiny system does not formally consider the merits of legislative proposals or other Community documents submitted to it.

The effectiveness of national mechanisms that strengthen parliamentary control over governmental action within the EU relates also to a mixture of other factors. One such factor is the constitutional and political context of each Member State.

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[7] D.Dimitrakopoulos, op.cit. n.2. C.S.Kerse, 'Parliamentary Scrutiny of the Third Pillar', (2000) 6 EPL 81-101, p.82.

[8] For a more detailed analysis on the UK scrutiny reserve system, see: A.Maurer, 'National Parliaments in the European Architecture', Constitutional Online Paper 06/02, The Federal Trust. C.Andersen, 'EU Policy-making and National Institutions – the Case of Belgium', in *The EU: How Democratic is it?*, S.Andersen and K.Eliassen (eds), Sage Publications, 1996, p.88. D.Dimitrakopoulos, op.cit. n.2, pp.411-3, 415-416 and 419. P.Birkinshaw and D.Ashiagbor, 'National Participation in Community Affairs: Democracy, the UK Parliament and the EU', (1996) 33 CMLR 499-529, p.504. J.Hood MP, 'European Scrutiny in the House of Commons', in *European Governance*, U.Rueb (ed), The Federal Trust, 2002, p.50. A.Cygan, 'The White Paper on European Governance – Have Glasnost and Perestroika Finally Arrived to the EU?', (2002) 65 MLR 229-240. C.A.Carter, 'Democratic Governance Beyond the Nation State: Third-Level Assemblies and Scrutiny of European Legislation', (2000) 6 EPL 429-459.

In some Member States, the EU is seen as a synthesis of domestic and foreign affairs and, hence, the degree of parliamentary scrutiny may vary a lot given the different concepts of 'control', 'participation' and 'scrutiny' within the national constitutional orders.[9] The British constitutional culture which applies foreign policy methods to EU affairs may often constitute *per se* an obstacle to effective scrutiny by extending executive privilege and a bargaining format that requires secrecy rather than transparency.[10] Also, the extent of information forwarded to NPs may be restricted according to national hierarchies of norms. In France, for instance, the concept of proposals containing provisions of a legislative nature implies that Parliament only receives those draft acts which would form part of the law within the meaning of Article 34 of the French Constitution. The decision, whether draft proposals constitute legislative acts, lies with the Government and the *Conseil d'Etat*.[11]

Despite national constitutional variations, parliaments have a central role in the national system of governance as legislative proposals require their assent and, for the overwhelming majority of citizens, a fundamental element of democratic legitimacy is that the executive is accountable to parliament. This view does not correspond with the supranational character of the EU, where government ministers act in their capacity as members of the Council mostly outside the procedural safeguards of national parliamentary control,[12] as NPs enjoy no formal role under the treaties. At EU level, it is only the EP that is able to formally block legislation under the codecision procedure, a function that goes beyond the scope of what the NPs can do. NPs may scrutinise the Council's agreed common position on a legislative proposal which occurs at an early stage of codecision, but as the Protocol - on the role of national parliaments in the EU - does not apply to a revised measure, national scrutiny will not automatically take into account any amendments introduced by the EP. In other words, such scrutiny will not guarantee that the views of NPs are represented in the final legislative act. The codecision procedure seeks to remedy the democratic deficit

[9] P.Birkinshaw and D.Ashiagbor, op.cit. n.8, p.527. A.Maurer, op.cit. n.8.
[10] Ch.Lord, *Democracy in the European Union*, Sheffield Academic Press, 1998, p.98.
[11] A.Maurer, op.cit. n.8.
[12] A.Cygan, op.cit. n.8, p.386.

at EU level by giving the EP an enhanced role in safeguarding ministerial accountability (direct Council accountability to the EP).[13] However, the empowerment of the parliamentary element through the EP cannot be transposed at the national level as a solution to democratic deficit. Apart from hardly being a satisfactory result from the point of view of NPs, it is very rarely that the European citizens see[14] any equivalence between the EP and NPs.

Due to their weak constitutional role in the treaties and input in EU affairs via national scrutiny reserves, NPs are far from key players in the EU system of governance. The lack of institutional 'fit' between the EU and its Member States and coordination between the EU institutions and domestic parliaments over issues such as legislative timetable or providing sufficient time for effective scrutiny go to the heart of the unease that exists in their relationship.[15] Moreover, the executive-oriented decision-making system of the Union and the practical difficulties in seeking effective accountability of national ministers who take decisions in the Council render the issue relatively straightforward. Powers which previously were under the jurisdiction of national legislatures have been shifted upwards to the European level and towards national executives. This had the added effect of eroding the separation of powers in national political systems as much as in the European: the power of NPs to 'check and balance' their governments by denying them law-making authority are compromised by the power of executives to constitute themselves as legislatures in the Council.[16] And to the extent that national governments escape domestic mechanisms of democratic accountability, EU perverts, rather than preserves, democracy in the

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[13] A.Cygan, op.cit. n.8, pp.386 and 388-9. A.Cygan, 'The Role of National Parliaments in the EU's New Constitutional Order', in *EU law for the twenty-first century: rethinking the new legal order*, Vol.1, T.Tridimas and P.Nebia (eds), Hart Publishing, 2004, pp.158-9.
[14] How Europeans see themselves - Looking through the mirror with public opinion surveys. European Documentation Series, Office for Official Publications of the European Communities, Luxembourg, 2001. Eurobarometer 59, *Public opinion in the European Union*, Spring 2003. Charter 88, *Five Democratic Tests for Europe*, 2003.
[15] V.A.Schmidt, 'The European Union: Democratic Legitimacy in a Regional State?', (2004) 42 JCMS 975-997, p.978. A.Cygan, op.cit. n.8, pp.387.
[16] Ch.Lord, op.cit. n.10.

national orders[17] by shifting the balance of power between the executive and the legislative in favour of the former.

6.2.1 The erosion of the constitutional autonomy of subnational actors

The impact of EU decision-making on the institutional balance in the internal legal orders of the Member States and how that affects democratic legitimacy is not restricted to the issue of the shift in balance between the legislature and the executive and is not restricted to the relationship between the EU and national levels. According to the Lamassoure report[18] on competences, 70 to 80 per cent of Community programmes were managed by local and regional authorities in the Member States, suggesting that their roles as partners of the Union should have greater recognition. Additionally, almost half of the Member States have regional governments with significant legislative and administrative powers domestically, but have not normally been able to set the terms under which those competences are transferred to the European level.[19] It is difficult to speak of 'regions' generally as the term is not defined in the treaties. More importantly, there seems to be a critical difference between symmetrical systems of decentralisation typical of federal constitutions, where some of the tasks exercised by the central government can be transferred to institutions representing the federal entities as a whole and asymmetrical systems of devolution which involve vertical and horizontal arrangements between national

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[17] D.Wincott, 'Does the EU Pervert Democracy? Questions of Democracy in New Constitutionalist Thought on the Future of Europe' in *The European Union and its Order: The Legal Theory of European Integration*, Z.Bankowski and A.Scott (eds), Blackwell Publishers, 2000, pp.114 and 122.

[18] EP Report A5-0133/2002 on the division of competences between the EU and the Member States. Rapporteur: A.Lamassoure, 24.04.2002.

[19] For instance, there is wide overlap between the legislative competence of the Finnish Åland islands and the Community legislative powers. From the point of view of the principle of subsidiarity, many of the issues are considered as regional matters suitable to be decided by their 25,000 inhabitants, like environmental protection and agriculture; yet, they are heavily regulated at EU level: N.Jaaskinnen, 'The Case of Åland Islands – Regional Autonomy versus the European Union of States', in *The Role of Regions and Sub-national Actors in Europe*, S.Weatherill and U.Bernitz (eds), Hart Publishing, 2005, pp.90 and 96.

and subnational institutions.[20] It may also be the case, as in Sweden, that the regional tier of government is weak with strong local tiers (e.g. municipalities).

The existing treaties allocate competences only between the EU and its Member States, denying regional and other subnational actors direct access to EU decision-making. The Maastricht Treaty established the possibility of regional presence in the Council under Article 203 TEC, providing that regional delegates are authorised by national law to commit their governments as a whole. However, pursuant to the principle of 'neutrality' inherent in the Article, a regional minister may be prevented from expressing regional interests divergent from those pursued by the central institutions in the Member State. The principle may be said to respect the right of each Member State to organise itself internally, such organisation being treated as 'entirely a matter of national sovereignty'.[21] However, the effect of the principle may be less than neutral. Even when national law otherwise guarantees a role for regional institutions in national policy-making, this role may be prejudiced by the working of Council decision-making procedures, in the sense that they serve to strengthen the position of central institutions in Member States in relation to regional institutions.[22] In some cases, the possibility of recentralisation or withdrawal of regional autonomy can be quite detrimental.[23]

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[20] The competence of the German Bundesrat to decide on Germany's vote in the Council concerning matters falling within the *Laender*'s competence is an example of a symmetrical system of decentralisation. On the other hand, in the UK, the asymmetric devolution model involves vertical and horizontal arrangements between national and subnational institutions which take place within two distinct models of devolution: a legislative model (Scotland) and an executive model (Wales). The Welsh devolution model is one of executive devolution which involves the transfer of functions to enable the Welsh Assembly to issue for instance subordinate legislation to implement EC law, while the Scotland Act equates the 'devolved competences' of Ministers to the 'legislative competences' of the Scottish Parliament: N.Jaaskinnen, ibid, p.90 and C.A.Carter, op.cit. n.8, pp.433 and 443-4.

[21] Case C-302/97 *Klaus Konle v Austria* [1999] ECRI-3099. According to its expression by the ECJ, EU law does not require Member States to make any changes in the distribution of powers and responsibilities between the public bodies that exist on their territory. If the institutional arrangements in the domestic system enable the rights which individuals derive from the Union legal system to be effectively protected and it is not more difficult to assert those rights than the rights which they derive from the domestic legal system, the requirements of EU law are fulfilled. A.Evans, 'Regional Dimensions to European Governance', (2003) 52 ICLQ 21-51, pp.24-28.

[22] COM(2001)428, European Governance, A White Paper, Brussels, 25.07.2001, pp.13 and 17.

[23] Spain is a stark example; the distribution of competences foreseen in the Spanish Constitution, devolving important areas of sovereignty to Spain's Autonomous Communities (ACs), was operative until Spain acceded to the EU. Thereafter, the fact that foreign affairs were the exclusive competence of the central government (under the Spanish Constitution) pre-empted any exercise of competence by the ACs, even though many of the powers vested in the EU fell under

In the UK, there is a stark contradiction between the treatment of relations with the Union as a non-devolved matter for which the UK Government remains responsible and the capacity of Council decisions to affect matters devolved to regional institutions.[24] In the context of the Scottish devolution, this does appear to be the case; notwithstanding the authority of the Scottish Parliament under the Scotland Act to issue both primary and secondary legislation to develop a number of policies, including policies for which the EU also has competence, the UK Government has reserved the right of negotiation in all matters at EU level, including those policies considered devolved. Furthermore, the UK Government also retained its legal power to issue secondary legislation for Scotland, in order to implement or transpose EU legislation should this prove necessary. [25] Hence, perhaps the most striking legacy of EU membership to Scottish devolution is a broadly defined statutory 'legislative override' whereby, even in non-reserved areas, the UK government may legislate for Scotland.[26] Subnational access to the

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regional competences. J.Bengoetxea, 'The Participation of Infra-State Entities in European Affairs in Spain: the Basque Case', in S.Weatherill and U.Bernitz (eds), op.cit. n.19, p.52.

[24] For instance, around 80% of the policy areas devolved to the Scottish Parliament are said to have an EU dimension. See Developments in the EU, January-June 2000, Cm 4922, 39. Also, COM(2001)428, op.cit. n.22, p.21.

[25] In relation to the EU, it is provided that any function of a Minister of the Crown (UK executive) shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972 (s.57 (1) of Scotland Act).This is subject to schedule 2 of the Act which limits materially the areas in which such power to enact delegated legislation may be exercised. For a more detailed analysis, see N.Burrows, 'Unfinished Business: The Scotland Act 1998', (1999) 62 MLR 241-260. C.Carter and A.McLeod, 'The Scottish Parliament and the EU: Analysing Regional Parliamentary Engagement', in S.Weatherill and U.Bernitz (eds), op.cit. n.19, pp.67-8.

[26] J.Scott, 'Member States and Regions in Community Law: Convergence and Divergence', in *Convergence and Divergence in European Public Law*, P.Beaumont, C.Lyons and N.Walker (eds), Hart Publishing, 2002, p.22. According to the *Agreement on the Joint Ministerial Committee* and the *Concordat on Co-ordination of European Union Policy*, supplementary agreements to the *Memorandum of Understanding Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*, SE/2002/54, January 2002, the UK Government envisages the involvement of the Ministers and officials of the Scottish Executive as directly and fully as possible in decision-making on EU matters which touch on devolved areas. Ministerial involvement in EU policy entails that issues are dealt with bilaterally between the lead Whitehall Department and the devolved administration or by correspondence or, when this is not possible, such issues are considered by the Joint Ministerial Committee which brings together UK Ministers and Ministers of the devolved administration. It is also envisaged that Ministers and officials of the Scottish Executive should have a role to play in relevant Council meetings. Decisions on Ministerial attendance at Council meetings are to be taken on a case-by-case basis by the lead UK Minister, depending on whether substantive discussions are expected of matters likely to have significant impact on devolved responsibilities. The role of the Ministers and officials of the Scottish Executive (and of the other devolved administrations) is to support and advance the single UK negotiating line which they will have played a part in developing. The emphasis in negotiations has to be on working as a UK team; and the UK lead Minister retains overall responsibility for

Council may have been established to the satisfaction of some subnational units like the German *Laender*,[27] but overall Article 203 has had limited reach, having been implemented only by three Member States: Austria, Germany and Belgium. Moreover, the provision does not imply direct subnational representation; it simply creates an opportunity to delegate the right of access to the Council to regional representatives, while regional influence basically remains within the logic of the Member States.[28]

Despite the fact that in some Member States regions and other subnational units enjoy constitutional status, at EU level they are deprived of any legal personality, at least in terms of access to judicial review before the European Courts to challenge the validity of EU legislation which they themselves have to implement at national level. In *Region Wallone*[29] the ECJ found the action

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the negotiations and determines how each member of the team can best contribute to securing the agreed policy position. Both Supplementary Agreements and the Memorandum of Understanding are statements of political intent and not binding agreements. As a matter of law, relations with the EU remain the responsibility of the UK Government and the UK Parliament.

[27] On this basis, specific provisions were inserted into the German Federal Constitution linking the external action of the Federal Government to the internal division of powers. According to Article 23(6) Grundgesetz (GG), members of the government of the *Laender* may and do act for the Federal Republic. Due to the so-called 'eternity clause' in Article 79(3) GG, no constitutional amendment is permitted that abolishes the federal structure or the basic participation of the *Laender* in federal legislation. Article 79(3) is interpreted by most scholars as barring any development that would completely deprive the *Laender* - or the Federal Republic - of their public powers by virtue of European integration. Linked to 79(3), Article 23(1) GG provides that the participation of the Federal Republic requires the Union to be bound, *inter alia*, by the principles of democracy and subsidiarity. P.C.Mueller-Graff, 'The German *Laender*: Involvement in EC/EU Law and Policy', in S.Weatherill and U.Bernitz (eds), op.cit. n.19, pp.109-112. For a more detailed analysis, see H.C.H.Hofman, 'Parliamentary Representation in Europe's System of Multi-Layer Constitutions: A Case Study of Germany', (2003) 10 MJ 39-65.

[28] J.Kottmann, 'Europe and the Regions: Subnational Entity Representation at Community Level', (2001) 26 ELR 159-176, pp.167-8.

[29] In Case C-95/97 *Regione Wallone v Commission* [1997] ECRI-1787 which involved *inter alia*, a challenge to a Commission decision prohibiting the grant of state aid by the Wallone Region. The same reasoning was repeated in Case C-180/97 *Regione Toscana v Commission* [1997] ECRI-5245, despite the fact that the applicant argued that, in view of the legislative powers which the regions possessed under the Italian Constitution, it had in the corresponding fields the same capacity as a Member State. In Case T-609/97 *Regione Puglia v Commission* [1997] ECRII-4051, a claim by a regional institution that the application or implementation of EU law was capable of generally affecting the socio-economic conditions within its territorial jurisdiction was not sufficient to render an action brought by the authority admissible. According to Case T-288/97 *Regione Autonoma Friuli-Venezia Giulia v Commission* [1999] ECRII-1871, it is possible to challenge a Commission regulation, but only where the Commission is under a specific duty, imposed by Union law, to consider the impact of its regulation on a given territory. In Joint Cases T-32/98 & T-41/98 *Government of the Netherlands Antilles v Commission* [2000] ECRII-201, the CFI examined the framework provision which authorised the Commission to adopt the contested regulations and found that the Commission was required to 'take into account the negative effects

inadmissible as it declared that its jurisdiction was limited to actions brought by a Member State (or a Union institution), a term which according to the general scheme of the treaties and for the purposes of the institutional provisions referred only to central government authorities and could not include the governments of regions or autonomous communities, irrespective of the powers they might have. Otherwise, it would undermine the institutional balance provided for by the treaties which *inter alia* governed the conditions under which the Member States participated in the functioning of the EU institutions. The rationale behind the interpretation amounts to the claim that it is not possible for the Union to comprise a greater number of Member States than the number of states between which it was established. However, such approach may prove precarious, as it could raise the claim that the meaning of 'state'[30] within a national legal system may refer to subnational authorities. The ECJ has repeatedly declared in its case law, as analysed in the previous chapter, that the right of legal protection is closely linked to the 'rule of law', one of the principles on which the EU is founded. Regional institutions should enjoy the fundamental right to legal protection as they are directly affected by EU legislation. There should be a degree of parallelism between the obligations imposed on regional institutions by EU law and their right to have access to judicial redress.

The Union is a multilevel governance system which does not afford subnational policy makers the legal and political space to take decisions that they are empowered to under their national constitutional arrangements.[31] EU decision-making is an arena of action to the exclusion of subnational participation and is imbalanced in that it imposes substantial obligations on the regions, while

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which its decision might have on the economy of the overseas country or territory concerned as well as the undertakings concerned'.

[30] In Case T-298/02 *Anna Herrero Romeu v Commission*, judgment of 25.10.2005, not yet reported, paras.18, 29, 32 and 35-6, the applicant set out the argument that the meaning of 'State' within the Spanish legal system did refer to subnational authorities as the Spanish Constitution established a highly decentralised legal system, known as 'the State of regional autonomy', which is characterised by a division of powers between the central administration and the Autonomous Communities. The argument was eventually rejected by the CFI which reiterated the ECJ's position that, according to the general scheme of the treaties, institutional provisions referred only to central government authorities and could not include the governments of regions or autonomous communities, irrespective of the powers they might have.

[31] Ph.Syrpis, 'In Defense of Subsidiarity', (2004) 24 OJLS 323-334, p.333.

allowing them little access to policy formulation or judicial control.[32] It induces centralisation by blindly assuming a unitary state where in practice there is none, thus, altering the distribution of powers between central and regional governments to the detriment of the latter. Moreover, EU decision-making endorses institutional bias (and not neutrality), because it operates to the benefit of certain groups to the exception of others. The norm that central governments represent their state in Council – the EU's predominant legislative body – means that central governments predominate in the EU. This affects the distribution of powers between central and regional governments in a very direct way. In the course of integration, competences allocated to both central and regional governments are transferred at EU level. Central governments continue to play a central role; while they monopolise formal representation, they also acquire influence over powers that were previously exercised by regional governments.[33] Therefore, it is one thing to say that the EU does not wish to interfere in the internal arrangements of the Member States and another to claim that it actually does not. The only regional presence in the EU institutional architecture can be effected through the Committee of the Regions (CoR)[34] Arguably, the CoR has failed to establish itself as an authoritative voice in the Union's institutional terrain because due to its limited advisory role, its diverse membership of local and regional governments but, most notably, due to the great deal of diversity in the territorial organisation of the Member States, it is hard to establish something like the 'position of the regions' in relation to legislative proposals in the first place.[35]

The constitutional status of subnational entities under EU law may prove particularly problematic for the Member States that have no constitutional competence or means to compel regions with wide legislative discretion to adopt the necessary rules to implement their Community obligations within their

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[32] S.Weatherill, 'The Challenge of the Regional Dimension in the EU', in S.Weatherill and U.Bernitz (eds), op.cit. n.19, pp.1-6.
[33] A.Bourne, 'The Impact of European Integration on Regional Power', (2003) 41 JCMS 597-620, p.600.
[34] Article 265 EC.
[35] J.Nergelius, 'The Committee of the Regions Today and in the Future-A Critical Overview', in S.Weatherill and U.Bernitz (eds), op.cit. n.19, p.124.

territories.[36] A stark example is the case of Åland, an autonomous region of Finland, where the division of legislative competences between the region and the state is mutually exclusive. Therefore, state legislation within the competences of Åland is inapplicable, even if Åland has failed to legislate in the field in question. In 2003, Finland vetoed regional legislation that amended the Åland Tobacco Act as it did not incorporate the ban on chewing snuff ('snus') included in the EU Tobacco Directive,[37] but it had no constitutional means to compel Åland to issue the necessary regional provisions so that Finland could comply with its EU obligations.[38] Åland has been reluctant to implement the ban because of the derogation Sweden has in this respect – the use of 'snus' is claimed to be part of the Swedish heritage – having declared that the cultural and historical ties with Sweden (another Member State) should make it eligible to the same exception rule. As a consequence, the Commission[39] has requested the ECJ to declare Finland in breach of EU law for letting Åland uphold sales of 'snus' on ferries to and from the island.

The introduction of the principle of subsidiarity[40] into Community law was intended to address anxieties about the locus of EU law-making and its remoteness from European citizens.[41] As a legal principle, abundantly examined

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[36] N.Jaaskinnen, op.cit. n.19. Case C-103/01 *Commission v Germany* [2003] ECRI-5369 shows how the internal distribution of competences within Germany is doubtless of profound importance, but is not relevant to the ascription of legal responsibility; the EU treats states as single entities.

[37] Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, (2001) OJL 194/26. Article 8 of the Directive provides: 'Member States shall prohibit the placing on the market of tobacco for oral use, without prejudice to Article 151 of the Act of Accession ...'.

[38] A regional Act may me vetoed by the President of the Republic following the opinion of the Finnish Supreme Court, but the Finnish Government has no constitutional means to compel the Åland legislator to issue the necessary regional provisions when, for instance, in conflict with EU law or Finland's other international obligations. N.Jaaskinnen, op.cit. n.19, pp.89, 93 and 101.

[39] Case C-343/05 *Commission v Finland*, OJC 281/11, 12.11.2005.

[40] Article 5 TEC.

[41] D.Lazer and V.Mayer-Schoenberger, 'Blueprint for Change: Devolution and Subsidiarity in the United States and the EU', in *The Federal Vision*, K.Nicolaidis and R.Howse (eds), OUP, 2003, p.133. P.Syrpis, 'Legitimating European Governance: Taking Subsidiarity Seriously within the Open Method of Coordination', EUI W/P 2002/10. G.deBurca, 'Reappraising Subsidiarity's Significance after Amsterdam', JM WP 7/99. The Commission, in its report on the subsidiarity principle ('Better Lawmaking 1998: A Shared Responsibility' COM(98)715), denies the democratic relevance of the subsidiarity principle in the EU context, arguing that the principle has nothing to do with the democratic deficit that has to be made good; it should not be confused with the democratic control of Community action.

in academic scholarship elsewhere, it fails to address the constitutional role of the regional and local tiers of government, although its main premise is to raise fundamental questions about the appropriate locus of political and legal authority within a complex and multi-layered polity. As a political principle it is less restrictive and it seems to embrace regionalism.[42] This may denote respect for the central-regional government relations determined by the constitutional law of each Member State.[43] This touches on what has been referred to in the US[44] as the distinction between democratic subsidiarity and executive subsidiarity. The former concept deals with the appropriate distribution and exercise of power between levels of government and is concerned with the protection of citizens' rights rather than the prerogatives of national executives. And regardless of the fact that in the EU context the rhetoric of citizens' rights and closeness to the citizens is regularly invoked, what appears in the primary legal text (of the Treaty) is the executive version, with subsidiarity as a principle appearing to protect Member State power against encroachment by the EU institutions rather than to protect individual rights and interests in the making of policy.[45]

6.3 The advent of the European Convention

Concerns over the Union's readiness to operate within its constitutional limits and the desire to bring the European citizens closer to the Union and its institutions led to a two-fold solution proposed by the Convention, and endorsed by the Heads of State and Government in 2004. Firstly, the agreed text of the Treaty Establishing a Constitution for Europe (TeCE) clarified and reorganised the treaty rules governing competence. Secondly, it enhanced the role of NPs in

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[42] Articles 1 and 6(3) TEU.
[43] A.Verges-Bausili, 'Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity and National Parliaments', JMWP 9/02. G.deBurca, op.cit. n.41. A.Evans, op.cit. n.21, pp.28-32.
[44] G.Bermann in his article 'Taking Subsidiarity Seriously', (1994) 94 Columbia Law Review 332-456, at pp.340-2, sets out the different values that underlie subsidiarity, including self-determination and accountability, political liberty, preservation of identity and diversity.
[45] G.deBurca, op.cit. n.41.

the system of monitoring the existence and exercise of EU competence. This section will deal solely with the narrower in scope issue of 'monitoring' of competence exercise. The reason being, while reorganisation - combined with the flexibility clause[46] - will allow national and subnational actors to function in their autonomous legislative space, arguably better than before, due to a clearer catalogue of competences,[47] the solution is localised to specific provisions and does not address the issue of 'creeping' EU activity in fields of shared competence.

With regard to the monitoring of competence exercise by NPs, the main outcome of the Convention was the inclusion of the two protocols in the TeCE dealing with the relationship between NPs and the Union's institutions in decision-making.[48] Firstly, the Protocol on the role of NPs is novel by establishing at EU level a formal requirement that information be transmitted directly to NPs to permit timely reflection and submission of reasoned opinions on legislative proposals, consultative documents, the annual legislative programme and the outcome of legislative Council meetings, thus permitting a more effective scrutiny of the activity of national governments.[49] Secondly, the Protocol on the

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[46] Regarding reorganisation, the relevant provisions are contained in Part I, Title III TeCE. Article I-11 refers to the fundamental principles that govern Union competence, namely, subsidiarity, proportionality and conferral ('the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution'). Article I-12 covers categories of competence: exclusive, shared and competence to act to support, coordinate or supplement the actions of the Member States. These are referred to in detail in Articles I-13 to I-17. Article I-18, labelled 'flexibility clause', which is the successor to the current Article 308 (ex 235) EC, provides that if action by the Union should prove necessary within the framework of the policies defined in Part III to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures. Further details pertaining to the manner of exercise of these competences are set out in Part III of the Constitutional Treaty. The text moves beyond the abstract by matching up particular areas of EU activity to each of the categories of competence.

[47] S.Weatherill, 'Better Competence Monitoring', (2005) 30 ELRev 23-41, p.29.

[48] Also, the TeCE places new responsibilities on NPs providing them with the opportunity to play a role in the life of the Union that goes beyond the policing of subsidiarity. Hence, NPs are to be involved in monitoring Europol and Eurojust and evaluating the implementation of Union policies in the area of freedom, security and justice. Article IV-444, the generalised bridging or *passerelle* clause, gives NPs still greater power: a single NP can block a unanimous decision of the European Council to remove the national veto from areas of legislation in Part III TeCE.

[49] The Protocol on the Role of NPs in the EU, annexed to the TeCE, OJC 310/204, contains the practical details. The Commission's legislative proposals, consultation documents, its annual legislative programme and other strategy documents submitted to the European Parliament and the Council shall also be sent directly to NPs. A six-week period shall then separate the

application of the principles of subsidiarity and proportionality[50] gives NPs a specific role in respect of the implementation of those principles. It poses an obligation on the Commission to review a proposal when a sufficient number of NPs consider that the proposal does not comply with subsidiarity.[51] The obligation is non-binding, yet one could argue that it imposes an institutional duty on the Commission to review its proposal and may maintain, amend or withdraw it, subject to providing the reason for its decision. This system of 'early warning' (EWS) is a new process that lays down a series of interinstitutional obligations which grants NPs the power to raise objections to EU legislation before the intervention of the legislators.

Both the Convention mandate and the final reforms, with regard to NPs, included in the TeCE are more restrictive in scope than the recommendations found in the Laeken Declaration.[52] The idea of a collective role of NPs emerged briefly in Valerie Giscard d'Estaing's idea about a Congress of the Peoples of Europe which would meet once a year bringing together MPs and MEPs,[53] although it did not seem clear how adding another institution would further a more transparent and efficient decision-making. The Convention strongly asserted that the EU should not intervene in the internal territorial arrangements of the Member States. Hence, treaty reforms focused on an enhanced system of national scrutiny that would allow NPs to formulate positions on EU legislative proposals and to convey early opinions on their compliance with subsidiarity.[54] The idea of

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Commission making available a legislative proposal and the date when it is placed on a Council agenda and (subject exceptionally to stated grounds of urgency) no agreement may be established on the text during those six weeks. Then, ten further days must elapse between the placing of a proposal on a Council agenda and the adoption of a position in Council.

[50] Protocol on the Application of the Principles of Subsidiarity and Proportionality, annexed to the TeCE, OJC 310/207.

[51] The obligation will also apply when the Commission intends to use the so-called flexibility in Article 1-18 TeCE, arguably to prevent the Union from making excessive use of this general supplementing power.

[52] Laeken Declaration-Annex I, Presidency Conclusions, European Council Meeting in Laeken, 14 and 15 December 2001, SN 300/1/01 REV 1. It included the questions: should NPs be represented in a new institution alongside the Council and the EP? Should they have a role in areas of European actions in which the EP has no competence? Should they focus on the division of competence between the Union and the Member States, for example, through preliminary checking of compliance with the principle of subsidiarity?

[53] CONV 369/02, Preliminary Draft Constitutional Treaty, 28.10.2002.

[54] CONV 548/03, summary report on the plenary session, 6-7 February 2003, 12.02.2003. CONV 74/02, Mandate of the Working Group on National Parliaments, 30.05.2002. CONV 353/02, Final report of Working Group IV on the role of NPs, 22.10.2002.

a 'red card' system[55] was advanced at the Convention, but proved disagreeable to the majority for fear that it would affect the efficiency of decision-making in the EU.

Although the TeCE provisions do not bestow NPs with a legislator's function, NPs appear as a sort of 'constitutional watchdog' with the specific task of monitoring compliance with the principle of subsidiarity. The process established in the protocols is entirely a voluntary one and it is very likely that NPs will use it with varying degrees of interest. Also, it is not clear what the Commission will do, if one third of NPs have objected to a proposal and it has to reconsider it. The Commission cannot be forced to change its position by NPs as their role remains essentially advisory.[56] As the pilot project on the 3rd Railway Package to assess the EWS has shown,[57] the Commission may be reluctant to use subsidiarity arguments to justify a proposal, in the first place. The non-inclusion of the 'red card' mechanism in the TeCE leaves a presumption of power in the hands of the Commission; it will remain the final political arbiter of which legislation is compatible with subsidiarity and whether to withdraw a proposal.[58]

Consequently, the NPs' success in scrutinising EU legislative activity will still depend on national constitutional practice, but also on the political will of

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[55] If two-thirds of NPs present reasoned opinion which object to a legislative proposal on grounds of subsidiarity, then the Commission will withdraw its proposal. CONV 540/03, 'The Early Warning Mechanism – putting it into practice', 06.02.2003. CONV 630/03, summary report on the plenary session of March 17 and 18, 21.03.2003.

[56] G.Davies, 'The Post-Laeken Division of Competences', (2003) 28 ELRev 686-698, p.692. J.Peters, 'National Parliaments and Subsidiarity: Think Twice', (2005) 1 EuConst 68-72, p.71.

[57] Report on the results of COSAC's Pilot project on the 3rd Railway Package to test the "Subsidiarity early warning mechanism", prepared by the COSAC Secretariat and presented to XXXIII Conference of Community and European Affairs Committees of Parliaments of the European Union, 17-18 May 2005, Luxembourg. COSAC agreed at its XXXII meeting in The Hague on 23 November 2004 to conduct a 'pilot project' in order to assess how the subsidiarity early-warning mechanism, provided for in the TeCE, might work in practice. COSAC chose the Commission's 3rd Railway Package as the subject for this initiative which was launched on 1 March 2005 and completed by NPs on 12 April. In total, 14 parliamentary chambers indicated that they found that one or more of the legislative proposals in the 3rd Railway Package breached the principle of subsidiarity. In total 20 of the 31 participating parliamentary chambers mentioned in their reports that the Commission did not justify its proposals with regard to the principle of subsidiarity, rendering their task of reaching a decision very difficult (on the basis of the Commission's justifications) on whether proposals complied with the principle.

[58] A.Cygan, 'The Role of NPs in the EU's New Constitutional Order', op.cit. n.13, p.167.

individual MPs to scrutinise their governments.[59] If the EWS gave NPs a veto power, they would probably have stronger incentive for taking the system seriously. Yet, the publicity of the Council legislative meetings and the direct provision of information from the EU institutions to the NPs are set to improve oversight of ministerial conduct. Effective scrutiny will also depend on a certain degree of Europeanisation of the pattern of relationship between NPs, should they exploit their newly-found opportunities to participate in scrutiny of proposed EU legislation, resources permitting. In late 2005, NPs grouped in the COSAC network have already agreed on a scheme resembling EWS which would assist them in identifying legislative proposals in the Commission's annual work programme that could potentially be in breach of subsidiarity.[60] This alternative plan might create a political dynamic pressuring the Commission to listen to NPs, although it is unlikely that the Commission will feel bound to endorse any initiatives resembling provisions of the 'shelved' EU Constitution.

According to Article 8 of the Protocol on the application of the principles of subsidiarity and proportionality, 'the Court of Justice shall have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it'. It is apparent that NPs are granted no direct access to the Court. In broad terms, Article 8 is intended to provide a mechanism by which NPs can present their views on subsidiarity to the ECJ, yet the precise legal process for achieving that

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[59] For instance, British MPs have been criticised by the Confederation of British Industry as being 'asleep on the job' when it comes to scrutinising proposed EU legislation: *The Guardian*, 20.8.2004.

[60] COSAC is a cooperation between committees of the NPs dealing with European affairs as well as representatives from the EP. At the biannual meetings of COSAC, six members represent each parliament. COSAC meetings normally take place in the capital of the country holding the EU Presidency. The scheme consists of drawing up a common list identifying Commission legislative proposals to be distributed to the NPs and to the EP. Participating NPs will then complete their scrutiny of the proposals and send any comments they have on subsidiarity or proportionality directly to the Commission, the EP and the Council within six weeks so that the institutions are made aware of specific concerns. The move was announced by Lord Grenfell, member of the House of Lords and current president of COSAC, speaking at a parliamentary conference in The Hague at the Second EU Conference on subsidiarity on 17 November 2005. Second Conference on Subsidiarity Church House, London 29 November 2005, Speech by Lord Grenfell, House of Lords European Union Select Committee. *EU Observer* 'NPs to show Commission 'yellow card'', by Mark Beunderman, 18.11.2005.

aim is not set out in the Article. The reference to the 'national legal order' goes to the heart of the relationship between NPs and the executive within the Member States, in terms of who remains in control of any application. To the House of Lords,[61] it would not be acceptable, and certainly contrary to the letter and spirit of Article 8, that the executive should remain in control of any application or that it could discontinue the proceedings without the consent of the NP. It is not also clear, how individual Member States would interpret the effect of the provision as an obligation to notify the action to the ECJ.

Article 8 only comes into play once a European legislative act has been adopted. Hence, a NP would have recourse to the provision according to the degree of its input during decision-making. Namely, it would raise a subsidiarity objection, if the NP did not agree with its government's decision to support a proposal in Council, or if its government was outvoted in the Council, or if an adopted legislative act was in a form different from that examined by a NP at an earlier stage.[62] Although the Protocol ultimately leaves room for judicial interference, it clearly recognises the political character of subsidiarity by attributing a primary supervising role to NPs.[63] Potentially, the prospect that a legislative act might give rise to a subsidiarity objection after adoption might present national governments with the incentive to keep NPs fully informed of any changes to an act during its passage.

The constitutional position of regions was not part of the formal Convention debates. There was little support for entrenching regional access to the Council in the TeCE which will remain regulated by domestic law. Thus, ambitious proposals like the one from the Scottish Parliament to establish a 'Regional Affairs Council' consisting solely of regional ministers had no chance of further consideration.[64] A positive development from the regional perspective is the clarification of competences, including the principle of conferral; despite the fact

[61] House of Lords, Scrutiny of Subsidiarity: Follow up Report, 15th Report of Session 2005-2006, Appendix 1: Government response to previous subsidiarity early warning mechanism report, 29.11.2005.
[62] ibid.
[63] J.Peters, op.cit. n.56, pp.68-72. A similar fate befell the CoR which remained an advisory body along the provisions of the existing treaties.
[64] European Committee of the Scottish Parliament, *Report on the Future of Europe*, 6th Report 2002, SP Paper 705.

that it regulates the allocation of competences between the EU and the Member States, this may be interpreted to implicitly limit the Union's reach *vis-à-vis* the competence of the regions, preventing it to creep to domains preserved by regional competence.[65] Besides, the regional and local elements are recognised as part of 'the fundamental structures' expressing national identity which the Union must respect.[66]

Most notably, the principle of subsidiarity refers explicitly to the regional and local levels in the main text of a treaty for the first time (Article I-11(3) TeCE) and, as part of policing of the principle of subsidiarity through the EWS, the Commission must take into account the regional and local dimension, the possible legislative, administrative or budgetary burdens to be borne by regional and local authorities, before proposing legislation.[67] It remains with the NPs and the CoR to take up complaints about subsidiarity with the Court. This will effectively open a choice for regions either to act through the NPs or the CoR. According to Article 6 of the Protocol on Subsidiarity and Proportionality, it is left to NPs to consult, where appropriate, regional parliaments with legislative powers, but the arrangements are set to favour the regional actors that already participate in the national parliamentary chambers of bicameral parliaments, as is the case of Austria and Germany.[68] Still, it is doubtful whether the six-week limit will suffice for the examination of proposals and consultations with interested parties, let alone regional parliaments.[69] What the Convention failed to do is to put forward any propositions that would constitute recognition of the status of the constitutional regions (regions with legislative powers or REGLEGs).

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[65] N.MacCormick, *Who's Afraid of a European Constitution?*, Imprint Academic, 2005, pp.77-8.
[66] Article I-5 TeCE. Also, recognition of the principle of territorial cohesion as an object of the solidarity expressed by membership of the Union in Article I-3 TeCE.
[67] Articles 2 and 5 of the TeCE Protocol on Subsidiarity and Proportionality.
[68] C.Jeffery, 'Regions and the EU: Letting them In, and Leaving them Alone', in S.Weatherill and U.Bernitz (eds), op.cit. n.19, p.41. In other Member States, including the UK, promises have been made to include devolved institutions in the system: CONV526/03, 'Europe and the Regions', 03.02.2003.
[69] A number of NPs reported that the six-week period was relatively short to carry out the whole process of examining proposals, making consultations and preparing reasoned opinions, especially when it coincided with the time a parliament was not in session. There was also confusion regarding the date from which the six-week period should start. The House of Commons noted that the timetable was particularly tight, if NPs were to consult regional parliaments with legislative powers: Report on the results of COSAC's Pilot project on the 3rd Railway Package, op.cit. n.57.

6.4 The Commission's 'EU governance' initiative: reaching out to national and subnational democracies

Any attempt made at EU level to manage the interlocking levels of competence, aiming *inter alia* at increasing the democratic legitimacy of the EU by bringing Europe closer to people, should be seen as a result of the cumulative influence of the post-Nice constitutional reform and the Commission's EU governance initiative.[70] In the White Paper on EU Governance (WP),[71] the Commission addressed the issue by emphasising the need to reach out to citizens through regional and local democracy. It pointed out that while the expansion of the Union's activities demanded a stronger involvement of regional and local authorities due to their responsibility for implementing EU policies, regions often felt that their function as elected, representative channels relating directly to the public was not appreciated. Because of the way the Union works, it does not facilitate multilevel 'partnerships' in which national governments may fully involve their regions and local authorities in EU policy-making.

The Commission sought institutional reforms that would embrace a more open, accountable and inclusive decision-making, appropriate for the Union's special nature as a polity. The normative discourse of the WP is strongly built on the idea of reaching out to citizens by regional and local democracy, above all, by increasing relations with 'civil society'. A better involvement of civil society actors in policy-making would lead to more acceptance of EU policies, as civil society gives voice to the citizens' concerns and delivers services that meet people's needs.[72] In this context, the Union should build partnerships based on a

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[70] Triggered by the Mandlkern Report of September 2001 and the White Paper on Governance, the initiative consisted of a package of actions: COM(2002)275, 'European Governance: Better lawmaking', 05.06.2002; COM(2002)278, 'Action Plan "simplifying and improving the regulatory environment"', 05.06.2002; COM(2002)277, 'Consultation document: towards a reinforced culture of consultation and dialogue containing a proposal for principles and minimum standards for consultation of interested parties by the Commission', 05.06.2002; COM(2002)276, 'Impact Assessment', 05.06.2002. SEC(2004)1153, Report on European Governance (2003-2004), 22.09.2004.

[71] COM(2001)428, op.cit. n.22, p.12.

[72] Civil society includes the following: trade unions and employers' organisations ("social partners"); nongovernmental organisations; professional associations; charities; grass-roots organisations; organisations that involve citizens in local and municipal life with a particular contribution from churches and religious communities. For a more precise definition of organised

reinforced culture of consultation and dialogue with a wide variety of actors. The Commission's task would be to establish a more systematic dialogue with representatives of regional and local governments through national and European associations at an early stage of policy-shaping, to ensure that regional and local knowledge and conditions are taken into account when developing policy proposals. While respecting the existing treaty provisions, the Commission also favoured the implementation of certain EU policies on the basis of target-based, tripartite contracts with the Member States, regions and localities. Central governments would play a key role in setting up such contracts and would remain responsible for their implementation, while the designated subnational authorities would undertake to implement identified actions to realise particular objectives defined in primary legislation. Hence, the Commission suggested that certain policy objectives could be achieved with the use of alternative means to traditional legislation (e.g. coregulation) and the establishment of a culture of public consultation, as traditional law-making processes are either too detailed or insufficiently adapted to local conditions and experience.[73]

The WP opened up the discussion on the role of national and subnational actors along the lines of the Laeken Declaration, particularly with reference to participatory democracy, the culture of consultation and transparency, as well as the Union's regional and local dimensions. The menu of suggestions reveals a conception of the EU as a system of multilevel governance with multitiered, geographically overlapping, governmental and nongovernmental structures. The list of potential partners is very comprehensive, including the Economic and Social Committee (ECOSOC), the CoR, individual regions, cities and localities, trade unions and employers' associations, grass roots organisations, practically everything and everybody.[74] However, placed in the context of a deeper and wider, post-Nice debate about the future development of the EU, the WP failed to provide specific proposals that took account of the parallel constitutional

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civil society, see the Opinion of the Economic and Social Committee on "The role and contribution of civil society organisations in the building of Europe", OJC 329/30, 17.11.1999. COM(2001)428, op.cit. n.22, p.14.

[73] COM(2001)428, op.cit. n.22, pp.11, 13, 16, 21 and 32.

[74] E.O.Eriksen, 'Democratic or technocratic governance?'. This paper is a part of contributions to the JMWP 6/01 Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance.

debate on the role and exercise of competence by NPs and regions with legislative powers.

The Commission proposed a variety of 'soft law' instruments as 'new tools of policy-making', which link EU decision-making to citizens *qua* organised interests as opposed to *qua* voters.[75] This culture of formal and informal consultative procedures, target-based, tripartite contracts, partnership arrangements and network-led initiatives means that the Commission could at any point consult subnational actors directly bypassing the governments of the Member States. These instruments of action depart from the traditional EU legislative process as well as the conventional conception of the Union as a multilevel system of *territorial* representation. In traditional decision-making, the principle of subsidiarity was introduced as an additional democratic device to assign competence to the right territorial level, to protect both regional autonomy recognised at national level and the Member States against 'creeping' EU intervention.[76] The implementation of the EWS makes a provision for wide-ranging consultations before any legislative act is adopted with the possibility of taking into account the national, regional and local dimension of the action envisaged. Procedurally and institutionally speaking, the EWS could be seen as a projection of the governance reform agenda, or vice versa.[77] Still, could it be extended to cover the monitoring of 'soft law'? The consultation process implies that all relevant stakeholders are consulted. It is not always the case that national government ministers, acting at the Council, consult NPs, let alone regions. It would be even more difficult for national (and regional) parliaments to track down 'soft law' initiatives, than to scrutinise traditional legislative proposals. As Stephen Weatherill rightly observes,[78] this 'softer' EU-level action, which lacks

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[75] Such as coregulation, open method of coordination (OMC). V.Schmidt 'The EU – Democratic Legitimacy in a Regional State?' (2003) 91 Political Science Series. P.Lindseth, 'Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity', in *Good Governance in Europe's Integrated Market*, C.Joerges and R.Dehousse (eds), OUP, 2002, p.139.

[76] S.Smismans, *Law, Legitimacy and European Governance-Functional Participation in Social Regulation.* OUP, 2004, p.6. L.Azoulay 'The Court of Justice and the Administrative Governance' (2001) 4 EPL 425-441, p.428. A.Héritier, 'The White Paper on European Governance: A Response to Shifting Weights in Inter-institutional Decision-Making', in JMWP 6/01 op.cit. n.74.

[77] A.Verges, op.cit. n.43.

[78] S.Weatherill, 'Better Competence Monitoring', op.cit. n.47, p.34.

immediate constitutional bite, taken with negligible respect for the principle of attribution of powers, would reignite anxieties about competence creep and the *associated impoverishment* - emphasis added - of the national parliamentary role.

The Commission was criticised for attempting to provide a legitimising discourse, in the WP, for its existing consultation practices with the aim to further strengthen 'the Community method' - and not the national, regional and local dimension - in which its role is better established. The WP was perceived more as a strategic 'self-interest' move to defend the Commission's institutional prerogatives, to redress its position in the institutional balance by regaining the ground lost in the codecision procedure[79] and generally to maximise its influence and discretion in matters of legislative activity. The Commission did not only draw attention to its policy initiation, but also sought to further strengthen that position based on strategic, long-term objectives. Most notably, it called for the right to withdraw proposals when interinstitutional bargaining (with the Council and the EP) undermines the original objectives of such proposal.[80] On the other hand, there was little preoccupation with the real challenges confronting the Union, the Member States and their regions. While it appealed to national and local democracy, the WP diverted its attention from national (and regional) parliaments to the 'civil society'. In effect, this approach diminished the importance of representative democracy in EU decision-making and disregarded the function of representative institutions as agents of democratic legitimacy within national systems.

One may not ignore the fact that the WP is a blueprint of the Commission's broad normative conception of the future of Union as a polity, which places the institution at the very centre of the institutional system. It appears that the Commission's objective was to insulate its role, as the guardian of Community interests and the driving force behind European integration, from the post-Nice

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[79] As analysed in Chapter 4, codecision established the Council and the EP as colegislators to the detriment of the Commission. F.Scharpf, 'European Governance: Common Concerns vs. The Challenge of Diversity' and B.Kohler-Koch, 'The Commission White Paper and the Improvement of European Governance', in JMWP 6/01, op.cit. n.74. S.Smismans, op.cit. n.76, p.27-8 and 130. M.Tsakatika, 'Claims to Legitimacy: the European Commission between Legitimacy and Change', (2005) 43 JCMS 193-220, p.211. A.Héritier op.cit. n.76.
[80] COM(2001)428, op.cit. n.22, pp.21-22, 28-9 and 32.

overhaul of the Union's institutional system which was fuelled by a desire to restrict the EU's constitutional reach. Often perceived as the main agent of the EU's 'creeping competence', the Commission sought to protect itself and reassert its constitutional role in an environment of bold constitutional reform which was about to take place through intergovernmental treaty revision and, most importantly, thorough the novel process of the Constitutional Convention.

6.4.1 'EU governance' debate: endorsing a broader conception of 'regime' legitimacy

The Union's democratic legitimacy has always preoccupied institutional reform, although it has been at the spotlight since the early 1990's. The traditional constitutional approach to reform had focused on the role of (territorial) representation with reference often to the parliamentary model (the EP or NPs) together with a rights-based approach. The EU governance debate, which developed at the political level in the context of the WP, broadened the discourse to take into account the involvement of 'stakeholders' in the Union's institutional set up, in the form of 'interest group participation' and more specifically 'civil society involvement'. This approach widened the normative framework within which EU's democratic legitimacy was perceived, by placing 'functional participation', i.e. formal structures ensuring the participation of interest groups in EU policy-making,[81] at the core of legitimacy deliberations.

The discourse on democratic legitimacy has been associated with the allocation and exercise of powers by the EU institutions, stressing the duty to respect each

[81] The term is borrowed from S.Smismans, although used by other commentators in academic scholarship. It means that people are represented as members of a functional group (an association with a specific function, purpose), in which people associate to realise a certain purpose or function, e.g. economic activity. Functional participation is used instead of interest representation, because the intention is not to focus on informal lobbying activity, but on formalised access channels through which people have access to policy-making and which represent more public, than private, interests. S.Smismans, op.cit. n.76, pp.42, 45, 47 and 78-79.

other's prerogatives, as enshrined in the treaties. As an institutional guarantee and manifestation of the 'rule of law', the principle of institutional balance was established by the Court of Justice in *Meroni*,[82] which precluded the delegation of discretionary powers to bodies other than those established by the treaties, on the ground that this would upset a fundamental guarantee contained in the balance of powers between the European institutions. Only in 1980 the idea of democratic participation entered into the legal approach to EU legitimacy. In *Roquette* the ECJ stated that the participation of the EP in the legislative process represented an essential fact in the institutional balance, intended by the Treaty, since it reflected at Community level the fundamental democratic principle that people should take part in the exercise of power through the intermediary of the representative assembly.[83] The logic behind this reasoning appears to be that, as power moved away from national parliaments due to European integration, a parliamentary body in this new third level of authority needed to counterpart that.

This traditional reading of institutional balance does not reflect the complex institutional reality of the EU which includes the gradual proliferation of formal and informal actors in the multilevel system of governance.[84] Although the treaties have been amended, as well as construed by the ECJ, to incorporate most of the changes in substantive policy areas, they do not reflect the degree of institutional change that has actually taken place, other than in relation to the five 'cardinal' institutions.[85] How do all these actors promoted by the Commission's governance debate fit into the concept of institutional balance? Since each institution represents a different constituency, at least in theory, the principle can be adapted to reflect the participation and representation of different

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[82] The Court held that '...there can be seen in the balance of powers which is characteristic of the institutional structure of the Community a fundamental guarantee granted by the Treaty to the undertakings and associations of undertakings to which it applies. To delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render the guarantee ineffective'. Case 9/56 *Meroni v High Authority* [1957 and 1958] ECR 133, p.152.

[83] Case C-138/79 *Roquette v Council* [1980] ECR 3333, para.33.

[84] S.Smismans, 'Institutional Balance as Interest Representation. Some Reflections on Lenaerts and Verhoeven', in C.Joerges and R.Dehousse, op.cit. n.75, p.102.

[85] G.deBurca, 'The Institutional Development of the EU: A Constitutional Analysis', in *Evolution of EU Law*, P.Craig and G.de Burga (eds), OUP, 1999, p.56.

constituencies within the EU process.[86] The participation of management and labour in European Social Policy, for instance, is enshrined in Articles 138 and 139 TEC. Although not an 'institution' in the strict sense and under Article 7 TEC, management and labour's role is endorsed in other parts of the Treaty as representing certain interests. One might argue that a new approach to institutional balance could embrace new actors.

The CFI's approach in *UEAPME*[87] may indicate a potential shift in the consideration of institutional balance. It declared that the participation of the parties 'representative of management and labour' could compensate for the lack of parliamentary involvement (the EP) in assuring the participation of the people.[88] To some extent, the CFI moved beyond the precedent set by the Court of Justice in that it formulated the participation 'through representative assembly' as a general requirement in legislation, whereas, to the ECJ, the democratic principle of parliamentary participation has always been circumscribed by the concrete institutional provisions of the Treaty.[89] Yet, the CFI's emphasis on the role of the EP in social regulation, as well as the express reference to legal precedent, read more as a confirmation of established case law.[90]

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[86] A new reading of the institutional principle in terms of 'fair interest representation' has equally been developed by Craig and deBurca and has been suggested by Joerges and Nyer. Thus, institutional balance is regarded above all as a political principle, used as a normative tool to shape the institutional framework of the Treaty. It is not limited either to the three EU institutions (EP, Council and Commission), or to territorial representation, but extends to interest representation. P.Craig, 'The Nature of Community: Integration, Democratic and Legitimate', in P.Craig and G.de Burca (eds), ibid, pp.36-41 and G.deBurca, ibid, pp.56 and 60. K.Lenaerts and A.Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance' and S.Smismans, 'Institutional Balance as Interest Representation. Some Reflections on Lenaerts and Verhoeven', in C.Joerges and R.Dehousse op.cit. n.75, pp.35-6 and pp.91-2 respectively.

[87] Case T-135/96 *UEAPME v Council* [1998] ECRII-2335.

[88] Case T-135/96, ibid, para.89: 'In contrast, the second procedure, referred to in Articles 3(4) and 4 of the Agreement, does not provide for the participation of the EP. However, the principle of democracy on which the Union is founded requires - in the absence of the participation of the European Parliament in the legislative process - that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level. In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.'

[89] S.Smismans, op.cit. n.76, pp.345 and 347.

[90] Case T-135/96, op.cit. n.87, para.88: 'As the case-law makes clear, the participation of that institution in the Community legislative process reflects at Community level the fundamental democratic principle that the people must share in the exercise of power through a representative assembly (Case C-300/89 *Commission v Council* [1991] ECR I-2867, para.20; Case C-138/79, op.cit n.83, para.33; and Case 139/79 *Maizena v Council* [1980] ECR 3393, para.34). In that

Moreover, the CFI's view in the *UEAPME* corresponds with the more traditional perception of the institutional balance in which respect for the constitutionally established interactions among institutions is combined with their democratic input. Hence, the legitimacy of the European social dialogue depends on the respect of a certain institutional balance, although the CFI has refrained from explicitly using the concept[91] and from providing further guidance as to how the participation of social partners assures the democratic principle. The CFI has broken with the standard legal view which combines the 'rule of law' and institutional balance with the sole democratic input of the EP. To this extent, the *UEAPME* case fits well with ideas of functional democracy, the notion that representation can be organised at different levels with regard to a specific function and a broadened institutional balance which the CFI did not explicitly use.[92] Having said that, it is hard to devise a general rule out of a single case.

What seems to evade the whole debate is that in decision-making processes like the European social dialogue, which involve consultation and negotiation with 'stakeholders', the Commission, an institution that does not represent a particular constituency, plays the most crucial role, while the role of the other EU institutions is rather limited. It has the monopoly of initiative; stakeholders are free to deviate from the proposal thereafter, but if the signatory partners wish to see their agreement implemented, they must again solicit a proposal from the Commission.[93] The Commission's proposals in the WP, to the effect that EU decision-making should evolve beyond interinstitutional relations within the EU's political system to include extended participation of civil society actors, may not sit well with the constitutional guarantees found in legal doctrine which preclude the delegation of decision-making to bodies other than those which the

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regard, it should be noted that, in accordance with that case law, the democratic legitimacy of measures adopted by the Council pursuant to Article 2 of the Agreement derives from the European Parliament's participation in that first procedure. S.Smismans, op.cit. n.76, p.345.

[91] S.Smismans, op.cit. n.86, pp.99-101. S.Smismans, op.cit. n.76, pp.350-1.

[92] S.Smismans, op.cit. n.76, pp.348-9, 352-3 and 354.

[93] Apart from the right to be informed by the Commission, the EP has no other formal role, if social partners decide to settle a matter by collective agreement. The Council's role is more significant. While it may decide whether to implement an agreement or not, it is not able to amend its content. A.Verhoeven, *The EU in Search of Democratic and Constitutional Theory*, Kluwer Law International, 2002, pp.222-4.

treaty has established, especially if such delegation is accompanied by a wide margin of discretion.[94]

Despite proclamations of the need to connect Europe with its citizens, the WP seems to have a limited understanding of 'governance' and citizens' expectations,[95] as it focuses predominantly on the effectiveness and efficiency of the EU decision-making system. While it lacks the theoretical reflection on what democratic legitimacy is and requires, at the same time it directly engages with questions of regime legitimacy by referring to the democratic principles of accountability and openness as principles of good governance by which the Union, its institutions and civil society actors should abide. In this context, the participation of civil society organisations in the policy-making process, their role and influence, raise issues of constitutional significance. *Inter alia*, how they fit in the Union's institutional framework, whether they are subject to the same procedural rules and principles that apply to all decision-makers, whether they provide formal channels that facilitate citizen participation.

For instance, in the absence of parliamentary involvement, the role of social partners in social regulation raises concerns over their representativity, as it is not clear who participates on behalf of whom.[96] While their influence through collective bargaining can be seen as a form of participatory democracy, they represent certain public or private interests. Therefore, the concepts of 'participation' and 'representation' are not necessarily mutually exclusive. To the CFI, the EU social dialogue is equated with the legislative process;

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[94] Case 9/56, op.cit. n.82, p.154.

[95] M.Tsakatika, op.cit. n.79, pp.208-9. This is mirrored in the public response which regrets the perceived limits of the WP's understanding of 'governance', which focuses predominantly on the effectiveness and efficiency of the EU decision-making system, while it disregards the issues of democratic legitimacy and democratic deficit in the European integration: COM(2002)705, Report from the Commission on European Governance, 11.12.2002.

[96] The Commission consults a large number of European workers and employers organisations on any new social policy proposal. In its 1993 Communication, the Commission published the criteria for becoming a social dialogue partner. It selected a number of organisations which fulfilled these criteria. Although these parties have been consulted on every proposal, so far, they have not played a part in the actual negotiation procedures. The Commission maintains that it cannot select the negotiators and leaves it to the social partners to decide. It urges the social partners to cooperate on this issue. COM(93)600, Communication on the Application of the Maastricht Agreement on Social Policy, 14.12.1993. L.Betten, 'The Democratic Deficit of Participatory Democracy in Community Social Policy', (1998) 23 ELRev 20-36, p.30.

agreements reached through the social dialogue are often incorporated into directives. To be democratically legitimate, the parties to such agreements have to achieve 'sufficient collective representativity'[97]

The membership of organisations like management and labour raises issues of representation, authorisation and accountability. If membership rates are taken into account, even if decisions are taken by unanimity, only a fraction of workers in Europe are represented and provide authorisation for their subsequent policies due to low union affiliation.[98] Apart from the formal ways of participation, functional interests maintain many informal and *ad hoc* relations with the EU institutions. There are no obvious ways in which the accountability of functional interest representation can be ensured. Article 139(1) TEC stipulates that should management and labour so desire, the dialogue between them may lead to contractual relations, including agreements, but is silent as to the form contractual relations should take. It is difficult to capture negotiations in legal terms, as they operate outside the realm of binding EU rules.[99] The EU is based on a set of fixed and identifiable rules and principles and judicial remedies are available to ensure respect for these rules and principles.[100] The move from economic to social regulation brought a radical shift. As examined in Chapter 5, in economic regulation the ECJ has to balance the economic objectives of the EU against the rights protection of individuals. In social regulation, organised participation retains the nature of association where there are no longer protected parties under EU law.[101] Individual and subjective legal protection is not only a *sine qua non* of legality, but an important yardstick in assessing a polity's democratic credentials.

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[97] Case T-135/96, op.cit. n.87, paras.88-90 and 110.

[98] UNICE, CEEP and ETUC, the three major players in the negotiation of the Part-time Work Agreement, did not represent the majority of workers and employers, leading UEAPME to challenge the Agreement by pleading breaches of the principles of equality, subsidiarity and proportionality. Case T-135/96, op.cit. n.87. L.Betten, op.cit. n.96, pp.30 and 32. E.Fisher, 'The EU in the Age of Accountability', (2004) 24 OJLS 495-515, p.504.

[99] A.Verhoeven informs us of the terms under which contractual negotiations take place between UNICE and UAEPME. According to their cooperation agreement signed on 4.12.1998, both parties have to respect the confidentiality of negotiations and social dialogue tends to be monopolised by large institutional trade unions. So, negotiations take place in an opaque manner in violation of the principle of transparency to which the EU is bound. A.Verhoeven, op.cit. n.93, pp.212 and 226-8.

[100] S.Smismans, op.cit. n.76, p.55.

[101] L.Azoulay, op.cit. n.76, pp.434 and 438. Case T-135/96, op.cit. n.87.

The WP on European governance has broadened the democratic legitimacy debate. In reaching out to national and regional democracy, it extended beyond the role of national and regional parliaments to embrace other stakeholders in the form of functional participation, yet it took the 'legitimating potential' of civil society participation too much for granted. It may be doubted that the delegation of lawmaking to civil society actors, as they are currently organised, lives up to the promise of making the EU decision-making process more democratically legitimate. Other institutions have been more reluctant to engage in a discourse of 'participatory democracy' interpreted as civil society involvement.[102] The EP has argued,[103] for instance, that elements of participatory democracy should be introduced with caution in the political system of the EU, as a structural element of rule of law is representative democracy. The main decisions on institutional reform and the future of the EU were eventually taken at the Convention and the 2004 IGC, which did not feature most of the Commission's EU governance proposals. Convention members had predominantly a national or European electoral mandate; hence, 'representative democracy' provided the normative framework for institutional reform. Some traces of the EU governance debate have emerged in the final text of the Constitutional Treaty, e.g. the meeting of representative and participatory democracy.[104]

6.5 Conclusion

This chapter has explored how EU decision-making and the allocation of powers therein pervert, rather than preserve, the democratic legitimacy within the legal orders of Member States. Specifically, this additional level of decision-making which is supranational and executive-oriented, due to the institutional eminence of the Council, may often trigger mechanisms already found in national

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[102] A.Verhoeven, op.cit. n.93, pp.226-8. E.Fisher, op.cit. n.98, p.502. S.Smismans, op.cit. n.76, pp.62 and 131.
[103] EP Report A5-0399/2001 on the Commission White Paper on "European governance. Rapporteur: Sylvia-Yvonne Kaufmann, PE 304.289, 15.11.2001.
[104] For a more detailed analysis, see Chapter 7.

constitutional orders that erode the constitutional role of national and regional parliaments. Such mechanisms might have not been otherwise invoked in normal national legislative processes, if it had not been for the lack of institutional 'fit' between the EU and its Member States and coordination between the EU and national institutions. The Member States may be able to contain the conduct of ministers acting in Council, but the ultimate question is not whether the Member States can control EU activity, but whether citizens can control the EU as well as their governments who combine the exercise of EU powers. The role of national (and regional) parliaments is quite important in this respect. The European Convention tried to address the issue constitutionally by proposing treaty reforms that would allow a direct involvement of domestic parliaments in the monitoring of legislative activity and its compliance with subsidiarity.

The EU Governance initiative sought to go where no constitutional reform went before by directly involving civil society actors in rule-making. In view of the limited effect of subsidiarity, particularly in relation to regions, the Commission combined the issue of 'where' to regulate – subsidiarity and proportionality – with the issue of 'how' to regulate, thus blending subsidiarity with the more process-oriented issue of legislative quality.[105] Yet, it envisaged institutional reforms that sanction and enhance its institutional role supported by actors whose activity is not endorsed by formal constitutional rules. This approach has undermined the formal constitutional arrangements within the Member States and the relevance of national and subnational representative institutions in the EU legislative process. Placed in the context of the wide post-Nice debate about the future development of the European Union, the WP should have at least taken into account the backdrop of the Convention debates which featured the role of NPs and regions in the European architecture.

[105] D.Lazer and V.Mayer-Schoenberger, op.cit. n.41, p.137.

CHAPTER 7

THE CONSTITUTIONAL CONVENTION AND THE DEMOCRATIC CHALLENGE

7.1 Introduction

The disillusionment with the intergovernmental conference system, which resulted from the frustrating experience of negotiations at Nice, prompted EU leaders to move decisions about the future of the Union away from the bargaining process of diplomacy. A Constitutional Convention was convened by the Laeken European Council, in 2001, with the aim to invigorate the whole process of institutional reform to bring it closer to the European citizens. The keywords of the Laeken Declaration[1] were democracy and legitimacy; this set it apart from previous initiatives which were mainly concerned with the functionality of the decision-making process in view of enlargement.[2] The Convention faced this democratic challenge in two respects. Firstly, in terms of its input; it was an institutional set up with widened participation and stronger representative basis. To assess its democratic credentials, a comparison will be attempted with the traditional intergovernmental process. Secondly, in terms of achieving institutional change, it will be explored whether the Convention stirred institutional reforms towards a more democratic and legitimate EU regime. Eventually, the outcome of the convention process, the Constitutional Treaty, was subjected to public approval and defeated in two referenda results. The remaining part of the chapter will explore whether the rejection signified: a) a rejection of the convention process itself; after all, the Convention may not have been successful in connecting with the EU citizens and b) whether the rejection was a protest against the content of the Constitutional Treaty, with particular reference to the regime envisaged therein.

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[1] Laeken Declaration-Annex I, Presidency Conclusions, European Council Meeting in Laeken, 14 and 15 December 2001, SN 300/1/01 REV 1.
[2] A.J.Menendez, 'Between Laeken and the Deep Blue Sea', (2005) 11 EPL 105-143, p 112.

7.2 The 'Convention' method: reinventing institutional reform?

The demand for comprehensive institutional reform has been aired from Maastricht through to Nice. Unlike the agenda of past intergovernmental conferences, what typifies the constitutional debate post-Nice is a direct link between the issues of overarching institutional reform and democratic legitimacy. In this context, the Nice European Council, in its Declaration on the future of the Union,[3] identified four subjects that particularly needed to be tackled, namely, the issue of competences, the status of the Charter of Fundamental Rights, the simplification of the EU Treaties to make them clearer and better understood, as well as the role of national parliaments. A year later, the Laeken Declaration addressed both the substantive and the procedural dimensions of reform;[4] the open-ended content of its mandate seemed to endorse a far-reaching discussion on the Union's institutional future.

What seemed to have acted as a catalyst was the inevitable prospect of a new, enlarged EU which was no longer perceived as mere rhetoric of an ambitious integration project. Neil Walker examines the interplay between enlargement and constitutionalism, arguing that the demands of enlargement have 'served almost as mantra to prompt and focus debate on reform of the institutional structures of the existing Union'.[5] Enlargement has often been a consideration affecting discussions and negotiations on past treaty reforms, in terms of how the Union's institutional system would cope with the accession of new Member States. Yet, the latest enlargement to the east was a real challenge not only in terms of scale (ten new members), but also due to the huge political, cultural and social landscape it would create. Most notably, the new Member States had only recent political experience with democratic government. The Union would become a peculiar mix of old and new democracies. What the Union needed was to find not just a single theory of democracy, but its own vision of democracy. The

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[3] Declaration No 23, attached to the Treaty of Nice.

[4] These included, *inter alia*, less unwieldy and rigid, but more efficient and open European institutions, so the issues to be examined were: a) competences; b) simplification of the legislative acts; c) more democracy, transparency and effectiveness and d) a way towards a constitution for the citizens: SN 300/1/01 REV 1, op.cit. n.1.

[5] N.Walker, 'Constitutionalising Enlargement, Enlarging Constitutionalism', (2003) 9 ELJ 365-385, p.375.

realisation of the limitations of the revision exercise carried out at Nice signified the exhaustion of the intergovernmental approach as a method of reforming the treaties.[6] The Laeken Council asserted that 'a different approach from 50 years ago' was necessary to meet the democratic challenge facing Europe and the expectations of Europe's citizens.[7] This new thinking led to the reinvention of the whole process of institutional change; Laeken brought a new trend: the Convention method, a bottom-up process[8] where the citizenry would generate proposals for treaty reform, which began its proceedings in 2002.

In all previous treaty revisions, the notion of involving people was negligible. The traditional intergovernmental conference is a secretive process of interest-led bargaining between national governments which is exclusively focused on one kind of interest (that of national governments). As Neil Walker rightly observes, an IGC 'unhappily combines a narrow consultative base, a protracted timescale and a procedure which encourages negative criticism rather than constructive debate'.[9] The IGC approach can be perceived as undemocratic as it may prevent any informed national debate on the reform agenda, if a government thinks, and maybe rightly so, that free flow of information may weaken its negotiating position. In stark contrast to all IGCs, the Convention considered the general European public as its audience. Most of the Convention documents were rendered public as they were produced and most Convention meetings were open

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[6] At the Nice European Council, the necessity to reach an agreement in order to wrap up the process had left many institutional issues untouched. After five days of intense diplomacy, no one was really satisfied with the result and the Heads of State or Government pointed immediately to the need for a new treaty revision. CONV 277/02, Contribution by Mr Jens-Peter Bonde, member of the Convention. PM Tony Blair admitted that the EU could not continue to take decisions as important as this in this way and continued that reform was essential so a more rational way of decision-making was achieved. Equally, Hans-Gert Pottering, leader of the centre-right European People's Party, noted that the IGC did not produce any results at Nice and insisted that another model should be tried. 'The Convention about the FutureS of Europe', 01.10.2002. Jens-Peter Bonde, *Nice Treaty Explained*, 2001. Available at www.euobserver.com/index.phtml?aid = 2082; accessed 25.2.03. *European Voice* 6/46, 2000.

[7] SN 300/1/01 REV 1, op.cit. n.1. K.Lenaerts and D.Gerard, 'The structure of the Union according to the Constitution of Europe: the emperor is getting dressed', (2004) 29 ELRev. 289-322, pp.289-290. H.Rasmussen, 'The Convention Method', (2005) 1 EuConst 141-7, p.142. EP Report A5-0168/01 on the Treaty of Nice and the future of the Union. Rapporteurs: deVigo and Seguro, 04.05.2001.

[8] This was not the first Convention in EU history; the convention method was used in the drafting of the EU Charter of Fundamental Rights, following a decision of the 1999 Cologne European Council, but this was the first time used to prepare an IGC.

[9] N.Walker, 'European Constitutionalism and European Integration', (1996) PL 266-290, p.281.

to the public.[10] It marked an evolution towards a more deliberative form of democracy in the involvement of civil society actors (non-governmental organisations, the social partners, the business world, academia, etc) in the Convention proceedings via the *Forum*, where consultations would serve as input to the debate and as proposals for institutional reform.[11] The Convention widened the number and type of actors involved, yet the parliamentary element was the most dominant;[12] it was an institutional set up characterised by a methodological shift to parliamentarisation.

Had the Convention acquired a higher degree of democratic legitimacy through its wider membership? Although the convention method was never likely to be a panacea for the (real and imagined) evils of the EU,[13] its transparent, deliberative and parliamentary character[14] could be said to have created a conception of a Union that functions democratically. Of course, any assumptions about its democratic legitimacy due to its parliamentary character need to be treated with some scepticism. Despite its ambiguous institutional nature - an *ad hoc* body of

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[10] But not those internal to the Praesidium.

[11] See SN 1565/02, Introductory Speech by President V.G.d'Estaing to the Convention on the Future of Europe, 26.02.2002. Also, the importance of continuous communication with the home front was emphasised by the Convention Chairman V.G.d'Estaing. He hoped that at least one Convention member from each country would provide a brief report on the progress of their national debates: CONV 49/02, Reports on national debates, 13.03.2002. The Forum was divided into four categories and organisations were invited to select the most appropriate category when registering: political or public authorities (including subnational level), socioeconomic interests (social partners, professional groups, etc), academic interests and think tanks and other civil society organisations, etc. A digest of contributions had been supplied to the Convention members in order to prepare for the first plenary session devoted to civil society, held on 24-5 June 2002: CONV 112/02, Digest of contributions to the Forum, 17.06.2002; CONV 48/02, The Convention and Civil Society, 13.03.2002; CONV 167/02, Note on the plenary session, 24-5.06.2002; CONV 120/02, Contact groups (Civil Society), 19.06.2002.

[12] K.Lenaerts and M.Desomer, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy', (2002) 39 CMLR 1217-1253, pp.1235 and 1238. The Convention was composed of 15 representatives of the Heads of State or Government of the Member States (one from each Member State), 13 representatives of the Heads of State or Government of the candidate States (1 per candidate State), 30 representatives of the national parliaments of the Member States (two from each Member State), 26 representatives of the national parliaments of the candidate States (two from each candidate State), 16 members of the European Parliament, 2 representatives of the European Commission. For a more detailed analysis on the composition and workings of the Convention, see O.Duhamel, 'Convention versus IGC', (2005) 11 EPL 54-62.

[13] J.Shaw, 'What is a Convention? Process and Substance in the project of European constitution-building', (2003) 89 Political Science Series.

[14] The Convention's work was structured in three consecutive stages: the listening stage, the study stage and the proposal stage. The first stage lasted the longest (eight months) and was supposed to contribute to a thorough examination of all visions on the purpose of the EU as it was acknowledged that citizens felt their voice was not heard on the future of the EU: CONV 6/02, Praesidium, General debate, 14.03.2002.

men and women, with a wide mandate - its broad membership and variant institutional and political background with the reflection of a broad ideological spectrum and divergent political philosophies undoubtedly rendered the Convention a democratic institutional setup with a much stronger representative basis than the traditional intergovernmental method.[15] Although designed as a consultative and not a constituent assembly with a formalised institutional role, the Convention was an institutional environment where input from subnational, national and supranational levels formed a pre-established idea on the likely direction of treaty reform, as opposed to the purely 'post-decision', 'take-it-or-leave-it' situation presented to national parliaments, following an intergovernmental conference. One might add the criticism occasionally voiced about the internal deliberations of its steering organ, the Praesidium, which was not made subject to the same requirements of openness or broad representative basis, not to mention the lack of vote.[16] Still, the Convention represented a true challenge to the previous arcane process of treaty revision characterised by closed circles of 'expert' groups.

While the work of the Convention was, technically speaking, only an informal preparation of the formal revision steps provided by Article 48 TEU, it modified the treaty revision rules and the nature of the 2004 IGC by restricting the terms of the diplomatic bargaining along the parameters of the constitutional text it produced.[17] Hence, most of the salient issues considered by the IGC had already

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[15] C.Closa, 'The Convention method and the transformation of EU constitutional politics' in *Developing a Constitution for Europe*, E.O.Eriksen. J.Fossum and A.J.Menendez (eds). Taylor and Francis Ltd, 2004, p.188.

[16] G.Stuart, *The Making of Europe's Constitution*, Fabian Society, Crowes, 2003, pp.17-18. The MP criticised the Praesidium membership as self-appointed elite. Also, the Convention had no legal status to make binding decisions on behalf of the institutions represented by its members. National parliamentarians were numerically the largest group but, in terms of influence, they found it almost impossible to reach common views unless they supported what the EP wanted and in the working of the Convention they were not treated as a discrete constituency. Consensus was achieved among those who were deemed to matter; the rest would not be allowed to wreck the fragile agreement struck. On the latter criticism, J.Kokott and A.Ruth seem to disagree. A formal vote would have unnecessarily induced some Member States representatives to agree only under reservations in order to keep options open for the IGC which would have ultimately weakened rather than strengthened the political authority of the proposal: J.Kokott and A.Ruth, 'The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Lacken Questions?', (2003) 40 CMLR 1315-1345, pp.1316-7.

[17] B.deWitte, 'Rivision', (2005) 1 EuConst 136-140, p.137. A.J.Menendez, op.cit. n.2, p.119. Giscard claimed that about 90% of the original document was retained in the final version: P.Lundlow, *The IGC and the European Council of June 2004*, EuroComment Briefing Note, No

been debated within the Convention, a fact which created some expectation that any given solution would be based on arguments and not on a mere compromise of interests.[18] The version of the Treaty finally agreed to by the Heads of State and Government bore a close resemblance to the Convention's draft, yet many of the last-minute deals on institutional provisions, such as the composition of the institutions and the thresholds in the new system for QMV were brokered by the IGC. Also, it was interstate diplomacy rather than the more supranational and diverse Convention which removed the final blockages on agreement.[19] Proceeding on the basis that 'nothing is agreed until everything is agreed',[20] the rotating Presidency of the Council had disproportionate influence on the structuring of the debate, the setting of the agenda and the establishment of agreements among different national representatives.[21]

Arguably, the Convention endorsement as a method of institutional reform may be traced in the TeCE where its use is institutionalised, albeit not as a mandatory part of constitutional change; the formal instrument of adopting treaty amendments is still the IGC. The fact that the Convention would be followed by a classic IGC confirms that the praxis of intergovernmental negotiation remains crucial.[22] Although it did not make a full transition from bargaining to deliberation, the Convention's deliberative potential should not be underestimated. The publicity of the debates could compel the governments to publicly justify their positions not just on grounds of national interest but on pragmatic reasoning. It developed its own dynamic to create a fusion of the old

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3.2, 29.06.2004. P.Norman, *The Accidental Constitution. The Making of Europe's Constitutional Treaty*, Eurocomment, 2005, p.283. V.G.d'Estaing stated that this would be an indication of success: V.G.d'Estaing, 'The convention and the future of Europe: Issues and goals', (2003) 1 Int J Constitutional Law 346-354, p.347.

[18] A.J.Menendez, op.cit. n.2, p.119.

[19] J.Shaw, 'Europe's Constitutional Future', (2005) P.L.132-151, p.140. D.Dinan, 'Governance and Institutions: A New Constitution and a New Commission', (2005) 43 JCMS 37–54, p.48.

[20] CIG 70/04, Presidency Note, Report on the Intergovernmental Conference, 24.03.2004, para.6.

[21] A.J.Menendez, op.cit. n.2, p.119. For instance, The Irish Presidency's early weeks were dedicated to holding bilateral meetings with all Member States, identifying issues and building trust. The strategy was to hold a sufficient number of meetings to resolve outstanding issues but limit the number of issues being discussed and progressively close off items. The IGC was formally convened on 17 June with a number of major open issues remaining for discussion including the size of the Commission, voting thresholds in the Council, the number of EP seats: N.Rees, 'The Irish Presidency: A Diplomatic Triumph', (2005) 43 JCMS 55-58, p.56.

[22] Article IV-443 TeCE. P.Magnette, 'Deliberation or bargaining? Coping with constitutional conflicts in the Convention on the Future of Europe', in *Developing a Constitution for Europe*, op.cit. n.15, p.212.

and the new. The convention method can improve democratic standards at the agenda setting stage of an IGC, because participation, unlike a classic IGC, is not limited to those privileged by a process that is masked under the veil of secrecy. Therefore, even if the Convention was designed as a consultative and not a constituent assembly, its symbolic significance to institutional reform is undeniable.[23] The argument against institutionalisation is that it adds a new layer to the already complicated institutional framework and decision-making.

7.3 Institutional balance and democratic legitimacy in the TeCE

The purpose of the Convention was to stir institutional reform towards a more democratic and legitimate EU 'regime'. However, institutional reform was discussed and realised outside the convention method, as the issue was regarded too contentious to be dealt with other than in plenary.[24] The absence of a Working Group on institutions did not, however, lead to more detailed deliberations. After fifteen months of Convention time and less than a month before its conclusion deadline, crucial proposals about institutional issues had not really reached the floor of the Convention. This was unfortunate in view of the importance that Laeken had attached to this institutional innovation (the Convention) as a forum of treaty reform to accommodate the enlarged Europe's new political and legal reality.[25] The shadow of the imminent IGC ensured a debate on institutional reforms that reflected the logic of intergovernmental bargaining. In the absence of sufficient deliberation on institutional issues, any discussions took place outside the Convention framework, via a parallel process of negotiation dominated by the Franco-German proposal on institutional reform (submitted in January 2003) and, by spring 2003, the President Valerie Giscard d'Estaing together with the Convention's secretariat had established a virtual

[23] J.Kokott and A.Ruth, op.cit. n.16, p.1316.
[24] CONV 277/02, op.cit. n.6.
[25] H.Rasmussen, op.cit. n.7, p.145.

monopoly over the power of proposal.[26] Apart from the recognition of the European Council as an EU institution in Article I-19,[27] the TeCE maintains the overall philosophy of attribution of powers with some enhancement to the competence of particular actors[28] in a context of a new consolidated and more simplified institutional framework. The Commission retains its monopoly on legislative initiative, the EP and the Council will continue to act as colegislators while the jurisdiction of the ECJ remains unaffected. On the other hand, the TeCE provides a better delimitation of powers as it clearly spells out and in some detail the functions of the EU institutions and also defines the nature and effects of their acts.[29]

The European Council's personal, elected and mandated presidency, which replaces the current system of six-month rotating presidencies by a full-time President, is without a doubt one of the major innovations in the TeCE.[30] This was the result of the Anglo-Spanish and the Franco-German bilateral initiatives on institutional reform[31] which broadly advocated for a greater continuity and efficiency in the workings of the Council Presidency. It also conveyed the need, perceived by its proponents, for someone to represent Europe in the eyes of the world, to give the EU a sharper identity and a much-needed leadership and accountability.[32] An important question is how a permanent President of the European Council would affect institutional balance. Although the new presidency would fundamentally alter the institutional balance among the EU institutions and between the EU institutions and the Member States, this was not

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[26] CONV 489/03, Contribution submitted by Mr. Dominique de Villepin and Mr. Joschka Fischer, members of the Convention, 16.01.2003. P.Norman, *The Accidental Constitution*, EuroComment, 2003, pp.319 and 322.

[27] An analysis of this institutional development was provided in section 3.3.1 of chapter 3.

[28] For instance, like the EP, whose legislative, budgetary, control, and electoral functions have been extended (see Art. I-20 (1) TeCE).

[29] The institutions' substantive functions and their balance of power are contained in Articles I-20, I-21, I-23, I-26 and I-29 TeCE. Articles I-33 to I-35 offer a list of legal instruments, as well as a distinction between legislative and non-legislative acts.

[30] To be elected by the Heads of State and Government for a period of two-and-a-half years: Article I-22 TeCE. J.W.Sap, 'The European President', (2005) 1 EuConst 47–51.

[31] CONV 740/03, Report by the Select Committee on the EU of the House of Lords, presented by Lord Tomlinson and Lord McLennan: 'The Future of Europe: Constitutional Treaty-Draft Articles on the Institutions', 15.05.2003. CONV 591/03, Contribution by Mrs. A.Palacio and Mr. P.Hain, members of the Convention: 'The Union institutions', 28.02.2003. CONV 489/03, op.cit. n.26.

[32] As PM Tony Blair reportedly said: P.Norman, op.cit. n.26 , p.139.

a point in the debates, mostly because no one could tell what the change would amount to.[33] This compromise led to two parallel institutional models: one predominantly intergovernmental – a European Council headed by a powerful President – and one *communautairian* based on the existing Community institutions.

Article I-22(1) TeCE informs us that there is going to be a long term President of the European Council. It tells us nothing about the division of power between the President of the Commission and the President of the European Council. There is obviously a risk of incoherence between the two Presidents whose responsibilities fall within the scope of the executive branch and which could potentially overlap, specifically in terms of the Union's representation both internally and internationally leading to poor visibility and complexity.[34] But there is more to the relationship between the Presidencies of the Commission and the European Council than the 'sharing' of executive power. There are also elements of hierarchy in planning the overall priorities for legislation. Unlike the current system under which the European Council merely 'provides the Union with the necessary impetus for its development and defines the general political guidelines', the Draft Constitution emphasises the European Council's role in establishing EU priorities as well as the EU's general political direction. This is subject to the caveat that the European Council shall not exercise legislative functions.[35] As analysed in Chapter 3, despite the political, rather than legal, undertone of the European Council's constitutional role, the institution often emerges as the *de facto* higher level decision-maker in the EU.

The provisions concerning the Council and its relationship with the European Council presidency are also vital for an understanding of the President's powers and influence. According to Article I-24(7) TeCE, the Presidency of the Council formations, other than Foreign Affairs, shall be held by the Member States on the

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[33] J.W. Sap op.cit. n.30.

[34] CONV 746/03, Contribution by Dini, Duff, Lequiller, members of the Convention: 'For a single presidency, over time, of the European Council and the Commission', 16.05.2003. P.Craig, 'European governance: Executive and administrative powers under the new constitutional settlement', (2005) 3 Int J Constitutional Law 407-439, pp.420-22.

[35] Article 4 TEU and Article I-21 TeCE. P.Craig, ibid, p.420. G.Bermann, 'Executive power in the new European constitution', (2005) 3 Int J Constitutional Law 440-447, p.443.

basis of equal rotation in accordance with the conditions established by a European decision of the European Council. Also, paragraph 2 of the Article provides that the Council shall prepare and ensure the follow-up to meetings of the European Council in liaison with the President of the European Council (and the Commission). Apparently, the Article creates a legal duty on the General Affairs Council (GAC) to ensure that the European Council's conclusions are followed up and a formal mechanism for the European Council to influence the priorities of the EU. Even though the formal right of legislative initiative remains with the Commission, the obligation on the GAC to ensure that the meetings of the European Council are followed up may require legislation on specific issues deliberated on by the European Council.[36] Furthermore, under Article I-24(3), the European Council's strategic guidelines on foreign policy are to be fleshed out by the Foreign Affairs Council. In this context, the same concern about the place of the European Council President in the institutional balance arises with regard to the other Union figurehead, the Foreign Minister.[37] It is almost impossible to find an institutionally balanced solution for the attribution to the President of the European Council of the function of the external permanent representative of the Union.

The institutional innovation of the European Council President may be seen as an attempt to create a notion of centralised public authority. It is often expressed that the EU should 'speak with a single voice' recognisable by its citizens. One should ask, however, whether a non-directly elected president would be an identifiable leader and a real representative of the Union and its constituent elements, particularly in some Member States where a president is a weak political figure. Somehow, this new feature of 'presidentialism' seems to offer a combination of leadership capacity and clear political responsibility, despite the fact that the President has been granted few formal powers and will,

[36] P.Craig, op.cit. n.34, pp.416 and 421.

[37] CONV 746/03, op.cit. n.34. A further task of the President will encompass heading and managing the external representation of the Union for CFSP matters 'at his or her level and in that capacity ...without prejudice to the responsibilities of the Union Minister for Foreign Affairs' (Article I-21(2) TeCE). This formulation hints at potential conflicts between these two offices. W.Wessels, 'The Constitutional Treaty–Three Readings from a Fusion Perspective', (2005) 43 JCMS 11-36, p.21.

consequently, have to carve out a real role for him or herself in practice. Besides, it is not apparent how decisions by a top-tier structure will address democratic legitimacy concerns, if the locus of decision-making is to shift further away from the EU citizens. An objection frequently voiced is that the office lacks democratic accountability.[38]

One of the aims of the Laeken Declaration was to render EU decision-making clearer and simpler. This has not been achieved in relation to the allocation of executive power. No fewer than three institutions lay claim to the exercise of executive authority; namely, the Commission, the Council and the European Council. It could be argued that accountability within a regime of shared executive power devoid of a single line of executive accountability will be more complex. In the case of the Presidents of the European Council and the Commission, the confusion of responsibility as between the two is accentuated by the fact that their respective responsibilities are not clearly defined.[39] But then again, the structure of the European Union has *never* been based on strict separation of powers, as it has been on notions of institutional balance. The major institutions represent different interests, thus it would be acceptable, at least in principle, for the executive power to be shared between a body representing state interests and another representing the Community interest, each of which is legitimated in different ways. The institutional system that emerges out of the Constitutional Treaty is structured on the same principle.

Although the post-Convention institutional framework is more democratic in terms of transparency, simplification and consolidation of the legislative process *per se*, greater role for the EP and NPs, more visible competence system, etc, one should not evade the fact there has not been core institutional reform. The problem with the Convention was the lack of a single - or if any at all - constitutional theory of power to stir the intended reorganisation of competences. Actually, there was no clear idea of what type of political regime the Union

[38] H.Wallace, 'Designing Institutions for an Enlarging European Union', in *Ten Reflections on the EU Constitutional Treaty for Europe*, B.deWitte (ed.), 2003, p.97, CONV 703/03, Study by the EUI presented by Vice-President Amato, 02.04.2003. CONV 486/03, Contribution from Ms. Elena Paciotti, alternate member: 'About the presidency of the European Union and its institutions', 15.01.2003. CONV 748/03, Summary Report of the Plenary Session, 15-6.05.2003.
[39] P.Craig, op.cit. n.34. G.Bermann op.cit. n.35.

should strive after. To J.Kokott and A.Ruth, more emphasis was placed on the nature of decision-making (simplification and transparency), because of the particular intricacy of the institutional debate which could be linked in part at least to the overarching question of the finality of European integration and the dispute dating back to the Fouchet plan as to which ideological conception the institutional design should follow.[40] Eventually, the path followed was that of piecemeal intergovernmental bargaining with all the formerly acceptable conceptions about the political characterisation of the Union, citizen representation and the appropriate division of powers, with no reflection on the overall system and the long-term effect these revisions and additions might have on the balance of powers within the Union.[41]

Although institutional balance is a guiding principle of the EU, it depends on what is politically acceptable by the Member States in every revision process. Firm agreement on a clear design for the institutions of the EU may appear attractive, yet it is not a realistic prospect for a number of reasons. Firstly, the Member States do not share a single political model, but different variants of liberal democracy: some unitary, some federal, some with active parliamentarism. Secondly, many institutional developments have emerged by a quite different route, through evolution and practice which is a more organic process (case law, interinstitutional agreements, etc).[42] Besides, Parliaments and people in the candidate countries were either in the process of or had recently been called upon to state their position on the current institutional provisions with a view to accession. In this climate, far-reaching changes to institutional structures would seem inappropriate in the eyes of public opinion in these countries.[43] Therefore, many Convention members generally or specifically expressed their attachment to the current Treaty provisions, as they emerged from the Treaty of Nice. And to that extent, the new document is no different. In

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[40] J.Kokott and A.Ruth, op.cit. n.16, pp.1330-1.
[41] M.P.Maduro, 'How Constitutional Can the European Union Be? The Tension Between Intergovernamentalism and Constitutionalism in the European Union', in Weiler and Eisgruber, (eds), Altneuland: The EU Constitution in a Contextual Perspective, JMWP 5/04, [http://www.jeanmonnetprogram.org/papers/04/040501-05.html]. J.P.Jacque, 'The Principle of Institutional Balance', (2004) 41 CMLR 383-391, p.387.
[42] H.Wallace, op.cit. n.38.
[43] CONV 748/03, op.cit. n.38.

the current revision, the aim of providing stronger political leadership clashed with the goal of maintaining the established institutional balance as it empowered the Union's executive. The consequence was, in Miguel Poiares Maduro's words, 'an aggravation of the tension between majoritarianism and intergovernmentalism in the European Union'. The TeCE reinforces certain majoritarian elements of the institutional system by addressing the issue of representation in the EP and Council, while intergovernmentalism reinforces the authority of the Council and the European Council through a variety of means, most notably, the president of the European Council.[44] Possibly, the ambitious Laeken mandate created higher expectations this time round to the extent that one might have ignored the real intention of the Convention, expressed by its President.[45] That is, to make decision-making simpler, while maintaining the institutional balance.

7.3.1 The democratic underpinnings of the Union's institutional system

Despite the limited institutional reform, the TeCE has enhanced the democratic aspect of the Union's value system on which its institutional framework and decision-making process are based. For the first time, it is clearly stated in a constitutional text that the EU is a democracy or at least aspires to become one (Article I-2 TeCE). This means that the standard of democracy, however defined, is accepted as a yardstick for the assessment of the workings of the EU. Unlike the reference in the Nice Treaty to democracy as one of the overarching principles of the Union,[46] there is a separate title on 'the democratic life' of the EU in the TeCE, qualified by the concepts of equality, representation,

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[44] M.P.Maduro, op.cit. n.41. W.Wessels, , op.cit. n.37, p.19.
[45] Speech by Valery Giscard D'Estaing, 'The Henry Kissinger Lecture', Library of Congress – Washington, 11th February 2003.
[46] Preamble and Article 6 TEU. The principle was inserted in the Treaty of Maastricht primarily as a political signal to candidate countries.

participation.[47] The Union emerges as a democratic regime rooted in the will of the citizens (and States) of Europe to build a common future.[48] Also, the TeCE text promotes various democratic principles to the rank of 'core constitutional principles' of the Union, like the equality of citizens.[49] Although it is difficult to apply such a simplistic equality principle to the EU, a polity of both states and peoples, and in relation to the European institutions,[50] the TeCE mandates the legislature to respect the Union's substantive values; the EU shall have an institutional framework which will aim to promote its values, advance its objectives, and serve its interests and those of the citizens and the Member States (Title IV, Article I-19).

Every citizen has the right to take part in the democratic life of the Union in order to follow, assess and contribute to the decision-making process of the EU.[51] In addition to the potential of the greater indirect involvement due to the enhanced role of representative institutions, like NPs, the Constitutional Treaty also promotes avenues of direct citizen participation. Hence, under Article I-47(1) TeCE, the EU institutions shall give citizens the opportunity to partake with their views in all areas of EU action. Further, European citizens are granted the right to invite the Commission to submit a legislative proposal when they consider that a legal act of the Union is required for the purpose of implementing the Constitution.[52] This citizen initiative may be taken if at least one million citizens from a 'significant number' of Member States - to be determined by European laws - put forward such a proposal and is designed to allow the citizens

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[47] Title VI, Articles I-45, I-46 and I-47 TeCE respectively.
[48] Article I-1 TeCE.
[49] Articles I-2 and I-45 TeCE This Article is an important manifestation of the Praesidium's general philosophy with regard to the institutional design of the Union. During the Convention discussions on institutional issues, the President cited three guiding principles on which all proposals would be based. The equality of citizens was one and remained uncontested in the plenary: CONV 696/03, Summary Report of the Plenary Session, 24 and 25 April 2003, 30.04.2003.
[50] For instance, the provisions on citizen representation in the EP, as examined in Chapter 4. The representation system, as envisaged in the Article 190(1) EC, aims to 'ensure appropriate representation of the peoples of the States brought together in the Community'. Despite the explicit reference to 'appropriate representation' of the peoples, the current system of seat distribution gives disproportionate representation in favour of the smaller Member States. Article I-20 TeCE maintains this standard of representation and appears at odds with Article I-44 which proclaims that 'in all its activities the Union shall observe the principle of democratic equality of its citizens'.
[51] Article I-46(3) TeCE.
[52] Article I-47(4) TeCE.

to take an active role within the law-making process of the EU. However, it should be read in context with other provisions of the TeCE. This right is only of an indirect nature, not mentioned among the citizens' rights (right to vote and to stand as a candidate at elections to the EP and at municipal elections, right to good administration) or in the EU Charter of Fundamental Rights (Articles II-39 to II-46). Also, this new body of one million citizens is not formally an institution part of the Union's institutional framework, summarised in Articles I-18 to I-31. Most notably, it does not in any way compromise the Commission's exclusive power to initiate legislation found in Article I-25(2). The impact and importance of the citizen initiative will entirely depend on the Commission's attitude, once it is confronted with the procedures and conditions defined by the implementing law[53] and, of course, the will of the people to use the new device.

Participatory democracy is mostly framed in the TeCE as civil society involvement, rather than direct citizen participation. According to Article I-48, the Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. The duty on the part of the EU institutions to provide opportunities for citizens to partake with their views in all areas of EU action applies also to representative associations, but it is only with representative associations and civil society that the duty extends to the establishment of channels of dialogue.[54] Civil society participation does not necessarily equal (direct) citizen participation. Charles Taylor rightly argues that civil society exists where a society as a whole can structure itself and coordinate its actions through free associations that are autonomous from policy makers. These free associations unite citizens in matters of common concern and by their mere existence or action can affect public policy. Sometimes, however, what occurs is an interweaving of society and government to the point where distinction no longer expresses the important difference in the basis of power or the dynamics of decision-making.[55] In the EU context, issues of social policy, for instance, debated between management and labour unions in tripartite

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[53] A.Auer, 'European Citizens' Initiative', (2005) 1 EuConst 79-86, pp. 80 and 83-5.
[54] Article I-47(1), (2) TeCE.
[55] He speaks about corporatism, when autonomous associations have become integrated into the state: C.Taylor, 'Invoking civil society', in *Contemporary Political Philosophy-An Anthology*, R.E.Goodin and P.Pettit (eds), Blackwell Publishers, 1997, pp.66-8.

negotiations with the Commission often take the form of corporatist negotiations. Then, questions about their democratic and representative underpinnings may emerge.[56]

The shifting of focus of treaty reform negotiations away from the traditional intergovernmental bargaining and towards a forum like the Convention, which encouraged the involvement of various actors, including non-elected, set the ground for institutional reform that would involve other models of democracy, apart from representative, a trend that had already been initiated by the EU governance debate. Hence, ideas of 'participation' invigorated the traditional conceptions of representative democracy. Some traces of the EU governance debate have emerged in the final text of the Constitutional Treaty, for instance, the recognition and promotion of social dialogue,[57] the Commission's efficiency-driven consultation practices.[58] Despite the explicit constitutional language, the TeCE marks a return to 'business as usual', namely a focus on the core EU institutions and territorial representation, on the one hand, and a rights-based perspective, on the other. The debate on institutional reform was once again about government and not about governance, so there was less focus on civil society actors and more on representative institutions.[59] This hardly comes as a surprise, since the Convention members had predominantly a national or European electoral mandate; hence, 'representative democracy' provided the normative framework for institutional reform and the dominant model of democracy for the Union's institutional system, as envisaged in the TeCE. For the first time, there is a clear constitutional statement that the representative nature of the EU is based on both the roles of the EP and the Council, although that has always been the traditional reading of the Treaty.[60]

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[56] As, for instance, in Case T-135/96 *UEAPME v Council* [1998] ECRII-2335.
[57] Article I-48 TeCE: 'The Union recognises and promotes an autonomous social dialogue. It shall facilitate dialogue between the social partners, respecting their autonomy. The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue. Article I-50 also in the context of transparency of the proceedings of Union institutions, bodies, offices and agencies, in order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.
[58] Article I-47(1), (2) and (3) TeCE.
[59] S.Smismans, *Law, Legitimacy and European Governance-Functional Participation in Social Regulation.* OUP, 2004, p.30.
[60] Articles I-45(1) and I-46 TeCE.

The use of QMV as the prevailing, formal method of decision-making tends to accentuate the representative character of the Union. The reference in the TeCE to consultation practices (with civil society actors) reflects aspects of the EU's institutional reality, but does not compromise its representative character. The institutional innovation of the citizen's initiative softens the otherwise strictly representative character of European democracy, but it has a territorial element associated with representative democracy; the signers must 'come from a significant number of Member States'. It is more the case that the 'representative' model is reconceptualised to take into account particular features of the EU decision-making.[61] This tendency towards representative democracy is hardly unanticipated. All Member States have in common a system of representative democracy where representative institutions, like parliaments, are regarded as pillars of democracy. Their common political culture is replicated in treaty revisions by institutional choices, like the ever-wider application of codecision, an enhanced legislative, supervisory and budgetary role for the EP, more involvement of NPs in decision-making. It would be unrealistic to expect the 'masters of the treaties' (the Member States) to opt for a model of democracy for the Union that is not akin to their common political tradition. What is more, a different democratic 'regime' could be potentially undesirable by the European public. The EU is a polity creating process in which authority and decision-making is shared across multiple levels of government. Governing institutions in the Member States are limited in how they can shape the standards by which they are judged. There would be little pragmatism in adapting democratic ideas to the EU content, if these were seriously at odds with the way in which national polities actually operate and the way people have accepted that their systems operate.[62] These considerations are significant, when one comes to think about the nature of the democratic regime which does and should operate in the EU.

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[61] Article I-47(4) TeCE: Citizens, no fewer than one million, may invite the Commission to take a legislative initiative on a particular issue. A.Auer, op.cit. n.53, p.80. S.Smismans, op.cit. n.59, p.31.

[62] Ch.Lord and D.Beetham, 'Legitimizing the EU: Is there a 'Post-parliamentary Basis' for its Legitimation?', (2001) 39 JCMS 443-462, pp.443-5. P.Craig, 'The Nature of Community: Integration, Democracy and Legitimacy', in *The Evolution of EU Law*, P.Craig and G.de Burca (eds), OUP, 1999, pp.16 and 22.

7.4 Is the ratification crisis a challenge to the democratic legitimacy of the Union's regime?

At Laeken, the EU leaders agreed on the need to improve and monitor the democratic legitimacy of the Union and its institutions to bring them closer to the citizens of the Member States.[63] The Convention stirred an overarching institutional debate in order to achieve this aim. It was also in itself a soft institutional revolution; in comparison with past rounds of treaty revision, it opened up the process beyond national governments to include a wide range of representative institutions, civil society actors, even the public. All these different sources arguably brought in ideas about the type of regime that would result from the institutional reform. The Constitutional Treaty, the product of a more open process of reform, measures up to the objective of a more democratically legitimate EU regime, in a number of ways. It incorporates the EU Charter on Fundamental Rights and clear constitutional principles underlying the Union's institutional system and policies; it opens up the legislative Council to public scrutiny when legislating; it delivers a clearer allocation of competences, while the merging of legal personalities strengthens the idea of a single institutional framework. The potential of citizens having more influence at the European level is realised, *inter alia*, through the enhanced role of the EP and the political approach to the policing of subsidiarity to involve NPs in EU affairs, while participatory democracy is introduced giving citizens and their associations a right to be heard not only by the Commission, but by all the EU institutions across a range of policies. This is an attractive package in normative terms.[64] Yet, the ratification process indicated that its delivery to the public has proven politically problematic.

So far, the TeCE was put to public approval in four national referenda and was rejected by the French and the Dutch people.[65] The reasons behind the negative results are diffuse and may have had little to do with the actual content of the

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[63] SN 300/1/01 REV 1, op.cit. n.1.
[64] P.Norman, op.cit. n.17, pp.315-9. P.Craig, 'Constitutions, Constitutionalism and the EU', (2001) 7 ELJ 125-150, pp.139-140.
[65] In Spain, France, the Netherlands and Luxembourg, in February, May, June and July 2005, respectively.

Treaty. It is difficult to claim that the French, for instance, devoted themselves to a pure exercise of exegeses of the 448 articles of the Constitutional Treaty and then decided to vote against it.[66] Post-referenda surveys have identified the motives behind the 'no' votes as diverse, dominated by public concerns over domestic rather than European issues, guided by the peoples' view of their countries' economic and social situation who saw an opportunity to punish unpopular national politicians, as was the case of France, or to protest their disconnection with the politicians who advocated for the Constitutional Treaty, as was the case in the Netherlands.[67] Similar concerns were responsible for the minority 'no' vote in the Luxembourg referendum.[68] This interpretation is reinforced by the existence of a homogeneous profile of the 'no' voters in Spain, France, the Netherlands and Luxembourg which is characterised by the sociologically poorer and less educated citizens, concerned with domestic unemployment and the poor economic situation.[69]

Most notably, what the post-referenda surveys convey is the failure of both the European and domestic political classes to explain, engage, communicate and debate effectively. The level of information on the Constitutional Treaty played an important role in the mobilisation of voters; in general, non-voters claimed

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[66] 'The dead end', *LeMonde*, 30.05.2005. L.Miles, 'Editorial: A Fusing Europe in a Confusing World?', (2005) 43 JCMS 1–9, p.5. Even the concept of the Constitution itself has not been rejected. According to three quarters of the French respondents, the European Constitution is indispensable in order to pursue European construction (75%). This proposal is supported by 90% of the 'yes' voters, but also by 66% of the 'no' voters. A majority of the French respondents, interviewed on the day after the referendum, consider that the European institutions have a good image (53%): Flash Eurobarometer 171, *European Constitution Post-Referendum survey in France*, June 2005.

[67] Thus, the French 'no' voters mentioned mainly the potentially negative effects of the Constitution on employment (31%), France's poor economic situation (26%), the perception of the Constitution as being too liberal from an economic point of view (19%), but also their opposition to the President of the Republic (18%). It is noteworthy that the rejection of Turkey's membership of the EU was mentioned spontaneously by only 6% of people who voted 'no': Flash Eurobarometer 171, ibid. 'France's No is not all bad', *The Financial Times*, 30.05.2005. L.Miles, ibid. P.Norman, op.cit. n.17, pp.309-10. Opposition to the national government or certain political parties and the economic situation in the Netherlands were given as reasons for the 'no' vote: Flash Eurobarometer 172, *European Constitution Post-Referendum survey in the Netherlands*, June 2005.

[68] The reasons for the 'No' were essentially based on national issues, one being the employment situation, and relegated European issues into second place: Flash Eurobarometer 173, *European Constitution Post-Referendum survey in Luxembourg*, July 2005.

[69] Supporters of the Constitution, on the other hand, were to be found mainly among the highly educated, urban elite. Flash Eurobarometer 171, op.cit. n.66. Flash Eurobarometer 173, ibid. Flash Eurobarometer 168, *European Constitution Post-Referendum survey in Spain*, March 2005. Flash Eurobarometer 172, op.cit. n.67.

that lack of information was the reason why they abstained.[70] The French referendum result was partly founded on the popular belief that the TeCE contained few social values and signified a move towards a liberal Anglo-Saxon economic view. Apparently, French politicians failed to convey to the nation the message that the Constitutional Treaty is, if anything, more social than Nice[71] and that there is little modification to the overall direction of the EU due to the lack of consensus as to its likely direction. Also, any changes to the treaty text on the whole favour social Europe – from the inclusion of the EU Charter, to the involvement of the civil society and the provisions on the citizens' initiative. In the Netherlands, the fact that the main political parties advocated for the Constitutional Treaty and the people voted against it constitutes further evidence of the disengagement between the political class and the public.[72]

The Convention was meant to remedy some of the democratic failings of the Union's institutional system, including transparency, comprehensibility and accountability. The process of constitutional drafting was accessible, drafts were made available to the public and one of the main objectives attained by the process was to simplify and consolidate the text of the Treaty. But the argument that previously inaccessible treaty revision procedures have moved in the right direction did not prove politically persuasive, especially in the cases of France and the Netherlands, if these remained relatively elitist and partly communicated. One of the failings of the Convention was that institutional issues were debated in the margins of the process, arguably deliberately so by the Praesidium to keep as much control of the process on key issues as possible.[73] And then the text agreed to by the Thessaloniki European Council[74] was rushed to the IGC, instead of engaging the public first through debate. Consequently, no matter how open a

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[70] Flash Eurobarometer 171, op.cit. n.66. Flash Eurobarometer 172, op.cit. n.67. Flash Eurobarometer 168, op.cit. n.69.

[71] Even where those voting took care to read the text of the proposed Constitution, they frequently took objection to certain provisions of part III, not realising that these reflected provisions of the TEC which have been in force for decades. G.deBurca, 'After the Referenda', (2006) 12 ELJ 6–8, p.6. *The Guardian*, 15 April 2005. P.Norman, op.cit. n.17, chapter 19. L.Miles, op.cit. n.6. Ch.Joerges, 'On the Disregard for History in the Convention Process', (2006) 12 ELJ 2–5, p.3.

[72] Flash Eurobarometer 172, op.cit. n.67. A.Samuelsen (ed), *One Union Many Voices – The EU meets the people*, Anders Samuelsen, 2005, pp.20 and 26.

[73] Gisela Stuart, op. cit. n.16.

[74] CONV 820/03, Draft Treaty establishing a Constitution for Europe, 797/1/02 REV 1, 27 June 2003.

process it was, the Convention failed to generate public awareness and interest.[75] And despite its revolutionary nature, the Convention did not manage to bridge the gap between the elites, who negotiated and agreed on the constitutional text, and the European public.

There is no evidence to suggest that the negative referenda results were a genuine rejection of the Constitutional Treaty, let alone of the institutional system envisaged therein. Eurobarometer surveys show there is little knowledge of the content of the TeCE among citizens. They also show that a significant proportion of the opposition to the Constitutional Treaty is founded either on ignorance or, even more seriously, on an erroneous interpretation of it. Some European citizens thus prefer to oppose the Treaty as a precaution, not knowing its contents; others are opposed to it because they misunderstand its contents.[76] The French and Dutch electorates registered their protest against the vision of Europe they thought they saw incorporated in the Constitutional Treaty, but they also manifested a collapse of trust towards their national elites to explain, communicate and debate effectively on the Constitutional Treaty.

However, the negative referenda results were at least partly due to the systematic failing of the Union's institutional system which lacks the political leadership to engage the public and create awareness on EU affairs, to create a political space of deliberation on EU policies and the design of the Union, to bring citizens closer to the Union institutions and decision-making. In Spain, despite the positive referendum result, a comparative analysis of voter turnout in EP elections and in the referendum indicates the existence of a structural abstention when it comes to European affairs: 70% of those who did not take part in the referendum did not vote in the 2004 EP elections. In that sense, it seems that Europe remains a political and institutional entity from which many electors feel

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[75] European citizens did not seem to have been moved by the apparent constitutional enthusiasm of their elites. Results of this survey show that the Convention on the future of Europe remains unheard of for a majority of Europeans, both in the current European Union (55%) and among the 10 adherent countries (57%): Flash Eurobarometer 142, Convention on the Future of Europe, 23.06.2003.

[76] Flash Eurobarometer 159, *The Future European Constitution*, February 2004. Flash Eurobarometer 159.2, *The Future European Constitution*, July 2004. Special Eurobarometer 214, *The Future Constitutional Treaty*, January 2005.

distant. The Spanish experience shows that in order to mobilise citizens there is a need for sustainable effort in informing and encouraging debate on EU issues.[77] Hence, rendering the Union's institutional system as well as the process of reviewing that system *structurally* more transparent, accessible, accountable and overall more democratic is not in itself sufficient to bring the Union closer to the citizens.

The TeCE failed to remedy this situation. The EU regime envisaged by the Constitutional Treaty is in most respects very similar to the one that exists under the current treaties. The TeCE institutional reforms did not create 'strategic leadership', at least in the sense that would make any difference in terms of democracy. The institutional innovation of the European Council President may be seen as an attempt to create a notion of centralised public authority, an identifiable leader, but it is unlikely that he or she will be so recognised by the citizens, as the role of President of the European Council overlaps with the office of the Commission President and the post of the EU Foreign Minister. Despite the fact that one of the initial aims of the Convention was to provide the EU with a clear political leadership, the institutional debate was defined by the objective of maintaining the institutional balance as envisaged in the current treaties.

National referenda are not necessarily appropriate or particularly democratic participation devices to enlist the people's consent over the transformation of the Union's institutional structure. They are not necessarily appropriate because they constitute decisions made on short-term, national considerations, rather than considered opinions on long-term European issues. They are subject to a variety of extraneous factors, including attitudes towards national governments. Consequently, referenda targeted at European questions do not provide the kind of validation required for the conduct of European affairs, because it is not easy to disentangle the European question from strictly national issues that affect the result. National referenda are not even indicative of the will of the wider European public. Only a small minority of the Member States which have already ratified the Constitutional Treaty used the referendum device and almost

[77] Flash Eurobarometer 168, op.cit. n.69.

all of them (with the exception of France) resorted to advisory ones. In the Spanish case, the lack of uncertainty regarding the actual impact of the advisory referendum result figured among other factors of abstention. So, the Spanish positive referendum result must be balanced with the fact that more than half of those eligible to vote did not take part in this consultation.[78]

But most importantly, national referenda are not particularly democratic, for how may one justify that that the vote of a few thousand citizens in a single Member State could block over 450 million European citizens and the rest of the governments from adopting a constitution?[79] What about the opinions the ratifying Member States have already expressed. The Spanish Foreign Minister (Miguel Angel Moratinos) has rejected calls to change the text of the TeCE arguing that it is not possible to explain to the Spanish people that the text that they have already approved is not a valid one.[80] And they are even less democratic, if they have to be repeated. Asking the French and Dutch to think twice is problematic because the reasons for voting 'no' varied not only between the French and the Dutch voters, but also between different socio-demographic groups within those countries. It is, therefore, hard to imagine what changes could be introduced to the TeCE that would help to change their minds. An alternative approach, that would engage all European citizens, would be to hold a pan-European referendum. Such a referendum could stimulate EU-wide campaigns that would allow the same message to be conveyed to everyone, rather than filtered via national constitutional terms dictating the language of referenda, which may often be unclear or difficult. If the citizens of the Member States perceive their interests as being directly affected by EU decisions, they might finally begin to recognise the importance of participating in EU-level democracy, direct or indirect.[81]

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[78] Flash Eurobarometer 168, op.cit. n.69.
[79] A.Auer, 'Adoption, Ratification and Entry Into Force', (2005) 1 EuConst 131-135, p.133.
[80] 'Spain against changes in Constitution text', *EU Observer*, 16.01.2006.
[81] Participants in a pan-European referendum would be voting for or against the same treaty/outcome as everyone else. A very strong majority (85%) of European citizens believe it would at the very least be useful to vote by referendum on the adoption of a new European constitution. A little less than half of these respondents even believe this would be a requirement: Flash Eurobarometer152, *Intergovernmental Conference*, December 2003.

In the aftermath of the 'no' votes in France and the Netherlands, the European Council decided, in June 2005, on a 'period of reflection' and then gave guidance to the Member Sates on the type of debate that could be organised. Namely, the period of reflection will be used to enable a broad debate to take place in each of our countries, involving citizens, civil society, social partners, national parliaments and political parties.[82] However, it failed to give a clear focus to the period of reflection and to demonstrate the will or capacity to stimulate and manage a European dialogue. As a result any communication initiatives at EU level are characterised by lack of leadership[83] and they appear more as an attempt of individual institutions, and the Commission in particular, to sanction and enhance their institutional role in this whole constitutional debate. If the Convention is to mark the start for a new relationship between the Union and its citizens, the Union and its institutions must rise to the challenge and explain and justify what they are about. If the EU politicians cannot figure out how to be part of an accessible political debate on EU issues, no matter what the outcome of national referenda, one point is clear; in the absence of conditions of connectedness between European citizens and this extra level of decision making (EU level) the future will always be volatile for the Constitutional Treaty and the type of regime constituted in this document.

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[82] Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe, European Council, 16 and 17 June 2005, SN 117/05, 18 June 2005.

[83] On the other hand, the Commission has launched its 'Plan D' for dialogue, debate and democracy in Europe, but it has explicitly stated that such debate is not a 'rescue operation for the Constitution', but it is rather intended to stimulate a wider debate between the European Union's democratic institutions and citizens. It has to be seen as complementary to the already existing or proposed initiatives and programmes, such as those in the field of education, youth, culture and promoting active European citizenship. *Plan-D* dovetails with the Action Plan on communicating Europe which seeks to improve the way that the Commission presents its activities to the outside world and the White Paper on communication strategy and democracy which will start a consultation process on the principles behind communication policy in the European Union and the areas of co-operation with the other European institutions and bodies. Together with *Plan-D* these initiatives set out a long-term plan to reinvigorate European democracy and help the emergence of a European public sphere, where citizens are given the information and the tools to actively participate in the decision making process and gain ownership of the European project. COM(2005) 494, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - The Commission's contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate, 13.10.2005. SEC(2005)985, Action Plan to improve communicating Europe by the Commission, 20.07.2005.

7.5 Conclusion

This chapter has explored the institutional environment of the Constitutional Convention which accommodated the latest constitutional revision process. The Convention was relatively open and broadly based with government representatives outnumbered by national and European parliamentarians. This created a direct link with the EU citizens along with the free flow of information. There was also relatively broad consultation of other EU bodies and groups from within civil society. The pluralism of the process was further enriched by the participation of both representatives of national governments as well as opposition parties. The reason why the Convention was revolutionary lies in the very nature of the European Union, inasmuch as it exists to serve both citizens and the Member States. At least in theory, it was the appropriate institutional environment to foment a profound debate on institutional reform.

The Convention was a culmination of over a decade long concern with the Union's democratic legitimacy. Its instrumentality is evident in the fact that it presented to the IGC institutional 'solutions' in the form of a Constitutional Treaty and not just 'options' for institutional reform. The TeCE streamlines the EU institutions, simplifies the decision-making and, overall, it provides the Union's institutional structure with more stable democratic underpinnings. Hence, the institutional system envisaged in the TeCE is in many respects more democratically legitimate, than the one that exists under the current treaties. On the other hand, the Convention made a crucial error in failing to set up a working group on institutions. There was no adequate deliberation on institutional issues and the Franco-German proposal, created through a parallel process of negotiation that took place outside the Convention, became almost the only product on the table. This had two implications. Firstly, the Convention failed to generate public awareness and interest and, thus, bring the EU closer to its citizens. Secondly, there has not been core institutional reform, a regime change, a reorganisation of the balance of power that would provide the Union with clear political leadership.

Eventually, the Constitutional Treaty was put through a process of ratification and was defeated in two referenda. One should not overplay the impact of these two negative results; many Member States have ratified the TeCE before and since these events. They hardly indicate an unequivocal challenge to the democratic legitimacy of the Union's institutional system. It was more of a failure of national politicians to carry their populations with them. Having said that, the ratification bottleneck, created by the 'no' votes, precipitates a political crisis within the EU that needs to be addressed. The negative referenda may not necessarily indicate a rejection of the Convention process itself or the content of the Constitutional Treaty, with particular reference to the regime envisaged therein, but they still raise fundamental questions about the ultimate role of the Union's institutional system and processes in facilitating the participation and representation of the public. It is not enough that these are structurally democratically legitimate. Despite the real process towards democratisation, the Union's institutional reality is that its system and processes lack political leadership with clear political accountability, identifiable by the people, who will give life to a European democratic space where EU issues can be debated and where people can express their will. In the Commission's own words,[84] a place 'where citizens are given the information and the tools to actively participate in the decision-making process and gain ownership of the European project'.

[84] COM(2005) 494, ibid.

CHAPTER 8

CONCLUSION

Since Maastricht, the European Union has evolved into a 'regime' of multilevel governance with a deepened and widened policy remit which often preempts national competence. The 'Europeanisation' of decision-making means that the locus of political control has shifted and the borders of the democratic (Member) State no longer embrace the whole spectrum of individual activity. As a result, the EU legislative process creates a system of legal acts adopted usually by qualified majority voting by institutions that are distant from the citizens of the Member States, but which still directly affect their lives. Inevitably, the redefinition of political boundaries created public anxieties about the legitimate and democratic underpinnings of the Union's decision-making process.

The thesis sets out to explore the democratic legitimacy of the EU institutional system with reference to the two overriding principles found in the national political orders, that is, the 'rule of law' and democracy and by focusing on government structures and their interrelationship. In this context, the relationship between the issue of institutional balance and democratic legitimacy is relevant to the issue of how the EU institutions interact in the decision-making process. In the absence of clear separation of powers in the EU treaties, the principle of institutional balance has acted as a substitute with the aim to provide a system of checks and balances that ensures that the system of governance and the exercise of power, therein, respect the 'rule of law' and democracy or, in other words, are both *legally* and *publicly* controlled, thus preserving the democratic legitimacy of a legal order. Namely, whether the way legislative power is allocated and exercised is confined within constitutional limits, based on a set of fixed and identifiable rules and principles and judicial remedies are available to ensure respect for such rules and principles. Also, whether the way legislative power is attributed and exercised allows for the participation of people in the legislative process.

Institutional balance, a democratic principle *per se*, has several manifestations in the system of the EU. As a legal principle, it was developed by the Court of Justice, on the one hand, to inhibit the EU from exceeding its lawful competence and, on the other hand, to inhibit the EU institutions from encroaching on each other's prerogatives. In the Court's case law, institutional balance is an expression of the 'rule of law' principle, which requires the exercise of power to reach a stage of equilibrium among the institutions, so as to avoid concentration of unlimited power in a single authority. Broadly, the phrase is intended to convey the impression that there is a reassuring symmetry among the respective powers and roles of the main institutions (the European Parliament, the Council and the Commission). As a political principle, it reflects the institutional reality of the EU in that each institution represents a different constituency, as well as its special nature as a union of states and people (e.g. the Council represents the Member States and the EP represents the people).

In assessing the democratic legitimacy of the EU, emphasis was placed both on individual institutions and the overall decision-making process. Undoubtedly, the EU is founded on the 'rule of law'. It is not merely a creation of law validly constituted by sovereign states according to international treaties, but also its institutional system, its objectives and policies are governed by law and the law is the means of enforcing its authority; its weapon is the law it creates. Although in its inception the Union was not intended to be a democratic entity, democracy has become one of the overarching principles of the polity and it is a value at the very essence of its regime. Yet, the legitimate and democratic underpinnings of the system have not been devoid of criticism. For instance, there are aspects of the institutional system that are not always reflected in formal constitutional arrangements which are said to challenge its normative foundations. Also, the bypassing of democratic channels when decisions take place outside the formal institutional framework is exacerbated by the dominance of executive institutions in the sphere of decision-making to the exclusion of more regular channels of democratic decision-making, such as the European Parliament and national parliaments. This diminishes the meaningful and equal opportunity of individuals to influence policy outcomes within their national orders, because of the distance

between the place where decisions are taken and the place where decisions affect them.

Hence, the thesis explored whether satisfactory constitutional control is not necessarily synonymous with inclusion within the treaty framework and whether there are other procedural guarantees in the system to ensure that there are limits to the allocation and exercise of legislative power. In addition, it sought to audit the quality of the European democracy, to establish how the Union performs against the defining features of democratic rule, that is, public control and political equality, but also key principles by which the democratic rule is realised, like accountability, openness, representation and responsiveness, (electoral) authorisation, rights protection, which seek to provide a scale, an 'index' of democracy. Representation entails that decision-makers should be representative of the governed at least in the sense of being institutionally constrained to consider the needs and values of the public. Authorisation is attained through the appointment of decision-makers into public office, which provides a publicly expressed consent for their subsequent policies, while responsiveness indicates the aligning of public policy with public preferences. Last but not least, accountability ensures that the terms on which power is authorised are duly observed and openness warrants that information is available about how power is exercised when taking decisions.

The Union's formal institutional system, as evolved, is based on an 'institutional triangle' supported, arguably, by a constitutionally unrestricted Court: the Commission monopolises the legislative initiative, while the EP and the Council act as colegislators. However, its overall philosophy with regard to the balance of power has changed little since the Treaty of Rome (1957); although legislative and executive powers are not formally separated, the system does favour executive over parliamentary institutions. This has had a number of implications: a strong role for the Council, a dominant role for the European Council, the undermining of the parliamentary element with detrimental impact on national legal orders, a system obscured with too many executive actors, one that hovers between supranationalism and intergovernmentalism.

To be more precise, the Council has always been at the centre of decision-making both as a strong executive and legislator, while, over time, it has come to share legislative and delegated executive powers with the Commission and the Parliament, but has never been subjected to parliamentary control at EU level. A scrutiny of the composition and function of the institution was deemed necessary in the context of democratic legitimacy, as both issues can attend to questions of representation, authorisation, accountability and transparency. The existence of specialised Council compositions across which the legislative work of the Council is currently spread and the various delegations of power within and away from the Council mean that it is an institution of uncertain external boundaries as well as internal complexity, which makes it difficult to determine with certainty whose interests it represents and how it allocates political accountability. The TeCE provision that the legislative Council should deliberate publicly will entail a degree of separation between the Council's legislative and executive functions and will render its workings more transparent, which is not currently the case. Also, voting in the Council is complicated, exacerbated by the pillar structure of the Union and the plethora of instruments to be adopted.

One might argue that all these concerns pertaining to the Council's dominant role in the Union's institutional system may be offset by the indirect mandate it receives through the democratic and legitimate governments of the Member States. On closer inspection, the indirect link between the Council and individual citizens may in fact generate democratic deficit in the EU legislative process. Participation in the EU decision-making process via the Council has strengthened the Member States governments' position in relation to other sovereign bodies, especially national (and regional) parliaments in the sense that they have acquired normative powers that they would not normally have in their own country without parliamentary control or authorisation. This had the added effect of eroding the separation of powers in national political systems, that is, the power of national parliaments to 'check and balance' their governments. Moreover, the lack of institutional 'fit' between the EU and its Member States means that EU decision-making endorses institutional bias, because it operates to the benefit of certain groups to the exception of others. The norm that central governments represent their state in Council – the EU's predominant legislative

body – means that central governments predominate in the EU; while they monopolise formal representation, they also acquire influence over legislative powers that were previously exercised by regional governments.

The Council's dominant role in the Union's legislative process has undermined the parliamentary element also at the European level. All Member States have in common a system of representative democracy where parliaments are regarded as pillars of democracy. Although the parliamentary system is standard reference in reflections on the institutional architecture of the European Union, the EU is not a parliamentary system. The democratic deficit in the EU decision-making process has been attributed over the years partly to the minimal legislative role of a directly elected, supranational institution, the European Parliament. It is the only supranational institution that receives a direct mandate and it has also been set up to constitute the democratic component, at least since direct elections were introduced. To this extent, the EP can be regarded as the democratic pillar of the Union. Yet, its significance in terms of democratic legitimacy is not the same as in the case of national and regional parliamentary institutions. Due to its form and function, the EP differs considerably from its national counterparts and, as such, it provides a poor model of representative democracy; it has not yet fully developed either as a representative body or as an institution of political authority. The lack of linkage between public preferences and constitutional decisions by the EP as well as the 'second order' character of European elections significantly diminish the EP's capacity to command public assent. An elected majority in Parliament does not necessarily express the policy preferences of the majority of citizens. The EP has been the biggest beneficiary of institutional reforms. If the attribution of powers were reorganised to reflect an even stronger legislative role for the EP, that would aggravate public anxieties about the weakening of national and regional parliamentary control. Thus, the democratic content of decision-making at EU level cannot be reduced to the degree to which the EP has a say.

No fewer than three institutions lay claim to the exercise of executive authority; namely, the Commission, the Council and the European Council. And among them, the European Council holds the dominant position. From the perspective of

democratic legitimacy, the European Council's role is problematic. Currently, its lack of institutional status means that it is not subject to the jurisdiction of the ECJ, and consequently to the rule of law, unless it encroaches on actions taken by the EU institutions under the EC Treaty. Its role has been constitutionalised by the TeCE, but as political rather than legal. Also, its decisions are not subject to parliamentary control at either the EU or national level. The notion of 'institutional balance' which rests on a trialogue between the Parliament, the Council and the Commission detracts from the fact that the European Council often emerges as the *de facto* higher level decision-maker in the EU, as its responsibilities are so comprehensive it can be regarded as the institution with the highest authority in the Union. The institutional innovation of the European Council presidency, in the TeCE, creates a complex regime of shared executive power devoid of a single line of executive accountability, as the respective responsibilities between the President of the European Council and the President of the Commission could potentially overlap. Then again, the structure of the European Union has *never* been based on strict separation of powers, as it has been on notions of institutional balance, thus it would be acceptable, at least in principle, for the executive power to be shared between each institution representing different interests. But, there is more to the relationship between the presidencies of the Commission and the European Council than the 'sharing' of executive power. There are also elements of hierarchy in planning the overall priorities for legislation. The increasing agenda-setting by the European Council may be seen as an effort to take over the role constitutionally held by the Commission.

The executive dominance in the Union's institutional system as well as the proliferation of actors who 'share' the executive functions, both supranational (the Commission and the Council) and intergovernmental (the Council and the European Council), mean that the system is a constant battle between supranationalism and intergovernmentalism. This in itself has a number of implications. The Union's multilevel decision-making occurs through a complex and interwoven pattern of intergovernmental and supranational structures that reveal a hybrid organisation (the EU) of intrinsic complexity. The rules that regulate the exercise of legislative power are not themselves based on consistent

and often visible criteria across the Union pillars; the fragmentation of decision-making means that the institutions are subject to diverse roles, principles and voting rules. Therefore, the legislative process appears quite complex and non-transparent at times. The application of different principles across the Union pillars, the varying and ambiguous voting rules, institutional roles and multiple avenues of influence, create uncertainty and unpredictability as to the actual boundaries of exercise of power by the EU institutions. Under the Constitutional Treaty, the merging of the pillars and the endowment of the Union with legal personality is set to clarify the Union's institutional architecture and legal status. But the incorporation of the second pillar into the general legal framework of the TeCE is of formal significance only, since most formal intergovernmental features of cooperation under CFSP remain intact. For that reason, it would be appropriate to say that, under the Constitutional Treaty, the Community method is a synthesis of the supranational and intergovernmental elements of decision-making.

The treaties govern interinstitutional relations only with regard to the basic principles of the operation of the specific legislative procedures and set out the general competences of the institutions. Yet, it is envisaged from the outset that the institutional system of the Community would include a Court of Justice with the express duty to ensure observance of the 'rule of law'. Legislative power can be legitimate to the extent that its acquisition and exercise conform to established law and are limited by it. To this end, the Court has established grounds of review of legislative acts adopted by the EU institutions to ensure that legislative power is exercised in constitutionally acceptable terms both as an objective guarantee of legality and a subjective safeguard for the individuals affected. In this context, the Court carries out procedural scrutiny of the legislative process to ensure that institutions act within the remit of conferred powers, but also with the procedural guarantees found in the treaties. Also, by adjudicating 'institutional balance', the European courts subject EU decision-making to a test of 'democracy', as an unwritten principle of higher law, which regulates the relationship between the EC institutions and against which the legitimacy of EC acts may be reviewed. Democracy issues raise intricate questions not only about the exercise of legislative power, but also about the protection afforded to

individuals as to the effects of legislative outcomes, pursuant to the 'rule of law' principle. Hence, respect for fundamental human rights is a condition of legality of Community law and, thus, also a ground of review. However, there is no intersection point between the protection of individual rights and institutional guarantees when individuals challenge the validity of legislative acts. While the Court has proclaimed that, where they have the right to participate in the legislative process, individuals may be granted standing on grounds of democracy, it has denied them standing on grounds of breach of the institutional balance - a 'principle' judicially proclaimed as intrinsic to the principle of democracy.

The treaties equipped the Court with far-reaching powers to enable it to discharge its duty to ensure that the law is observed. The Court interpreted this duty widely and its 'principles' discourse imposed a constitutional 'ethos' on the Union's institutional system with characteristics quite akin to the liberal democratic traditions shared among the Member States: open government, democracy, rule of law, human rights protection and division of powers, even if in minimalist terms. With respect to fundamental rights, the Court's jurisprudence may be justified due to the lack of fundamental rights protection under EU law. With respect to institutional principles, too creative an interpretation of the Union's institutional design was less justified, especially as the division of functions between the institutions are by and large dealt with in the Treaty. The inference is that the Court employed institutional principles and fundamental rights to institutionally position itself in the decision-making process. By using institutional principles in its jurisprudence, the ECJ delineated the institutional position of the EU institutions within the EU institutional system. By using fundamental rights, it defined its own institutional position *vis-à-vis* the other EU institutions. So, by incorporating general principles of law into *the law* to be observed, the Court created a constitutional regime of division of powers in an institutional system where control over legislative activity remains central to its mandate.

The empirical reality of the evolving interinstitutional relations is that, as the treaties govern only the basic principles of the operation of the specific

legislative procedures and set out the general competences of the institutions, there is much room for different interpretations of the institutional roles and the application of legislative procedures. So, due to the openendedness of the treaties, the actual machinery of law-making may be *ad hoc* and unconstrained by formal rules. The institutions frequently use all the political and legal means available to increase their impact on the decision-making process and to defend their prerogatives. For the most part, institutional change yielded by successive treaty amendments has not been so much the result of formal negotiations, but rather represents the sanctioning of established informal practices, like the use of interinstitutional agreements (IIAs). Quasi-formal and informal procedures may emerge around decision-making and even if influenced by the formal treaty environment, they are not fully determined by it, as they originate from and are enforced by the institutions themselves. In this context, the proliferation of 'soft' law instruments is a point of concern, since it is less clear what requirements actually apply to their adoption, how their use fits in with the formal, legally binding instruments and how they affect the legal position of individuals.

Institutional balance is not a static concept; it evolves over time as the Union's founding treaties are adapted and construed by the European courts, by the gradual proliferation of formal and informal actors as well as institutional practice. The treaties reflect the degree of institutional change that has actually taken place only in relation to the five 'cardinal' EU institutions (the Council, the Commission, the EP, the ECJ and the European Council) and the Court's democratic reading of the institutional balance did not extend further to take account of all institutions that represent a different constituency as part of the formal constitutional and informal institutional reality of the EU. The Commission took the institutional lead, in the post-Nice EU governance debate, to propose that institutional reform should be broadened to take into account the involvement of 'stakeholders' in the Union's institutional set up, in the form of 'interest group participation' and more specifically 'civil society involvement'. However, the Commission was criticised for attempting to provide a legitimising discourse for its existing consultation practices with the aim to further strengthen 'the Community method', in which its role is better established, and also for wishing to bypass the formal legislative process dominated by the codecision

procedure, which preserves a strong legislative role for the EP and the Council. Any adaptation of the concept of institutional balance to embrace civil society actors, their participation in the decision-making process, their role and influence, raise issues of constitutional significance. For instance, how they fit in the Union's institutional framework, whether they are subject to the same procedural rules and principles that apply to all decision-makers, whether they provide formal channels that facilitate citizen participation. Some traces of the EU governance debate have emerged in the final text of the Constitutional Treaty, like the recognition and promotion of social dialogue, the Commission's efficiency-driven consultation practices, but reforms placed less emphasis on civil society actors and more on the cardinal EU institutions which are part of the formal institutional framework and akin to the common political culture of the Member States.

The peculiarities of EU decision-making described so far, such as the complexity of the pillar structure, the proliferation of acts and instruments that can emanate from informal practices of the institutions (and other actors), the obscurity regarding the European Council's role and the Council's internal workings, raise real concerns about the existence of adequate and visible normative controls as to the rules regarding the particulars of decision-making and the limits of institutional activity. Satisfactory constitutional control is not necessarily synonymous with inclusion within the treaty framework, but the absence of observable norms or standards governing institutional practice and the increasing difficulty in identifying which institutions are politically responsible for decisions hinder, rather than facilitate, citizen understanding of the EU system. Even if there are still safeguards in informal institutional practice and channels of cooperation, such 'checks and balances' on their own only deliver controlled government not *publicly* controlled government. Therefore, the signatories of the Laeken Declaration, annexed to the Conclusions of the European Council, aware of the close link between the legitimacy of the European project and the democratic guarantees to its exercise, invited the Convention to reflect on different ways to increase the democratic legitimacy of the Union.

The Convention was an institutional set up with widened participation and stronger representative basis. It was believed that the public would somehow authorise the redesign of the Union's institutional structure by being involved in the actual reform debate, rather than just being asked to ratify a treaty designed purely through the obscure system of intergovernmental conferences. But as the institutional debate eventually took place in the margins of the process, the Convention failed to connect with the public. The Constitutional Treaty delivers a more democratically legitimate EU regime, in a number of ways. The structural simplification of the treaties improves the comprehensibility of the system. Greater transparency is recognised formally as part of the democratic life of the Union, but what appears more notable as regards the functioning of the democratic process, is the novel principle of 'publicity', that is, the general 'active' duty to legislate in public and to publish legislative material. There is a more visible competence system which also reflects, to a certain extent, both the formal and informal aspects of EU decision-making in terms of representation of different constituencies. The potential of citizens having more influence at the European level is realised through the enhanced role of representative institutions, like NPs, through avenues of direct participation as well as by the general right for every citizen to take part in the democratic life of the Union in order to follow, assess and contribute to the decision-making process of the EU.

The TeCE reinforces the democratic aspect of the Union's value system on which its institutional framework and decision-making process are based. It promotes various democratic principles to the rank of 'core constitutional principles' of the Union, like citizen equality. It provides for a democracy that is based on human rights strengthened by the incorporation of the EU Charter on Fundamental Rights in the treaty text. Thus, the TeCE offers a blueprint for a scheme of government within Europe that is both limited (clearer allocation of power), more democratically answerable and accessible to its citizens. Some institutional innovations, like the open deliberations of the legislative Council and the 'yellow card' procedure, are already part of institutional practice. Even if the TeCE does not enter into force, it has already marked an evolution of the

institutional system[1] and a real progress towards democratisation. The EU has come a long way to develop into an eminently democratic political institutional system, bearing in mind that, in its inception, it was not intended as a democratic organisation. As a system in constant evolution, it is a sort of 'unfinished' democracy with improvements facilitated in every treaty reform,[2] but any expectation that it would ever arrive at a stage of structural perfection in terms of democracy is an unattainable ideal; no national political system has ever achieved that either. Besides, it is doubtful that it would turn the Union into a fully-fledged democracy. Although the institutional framework emerges structurally more democratic in every treaty reform, the EU constantly faces the challenge of complex ratification processes since Maastricht.

The reasons could be traced to the fact that even if the constitutional or procedural features of democracy are met, these alone are not enough to meet the popular aspects of democracy one finds in a system of government with a popularly authorised leadership, direct political accountability *vis-à-vis* citizens and the formal function of opposition. The overall scheme of the Union's institutional system remains problematic, because the distance between the place where decisions are taken and the place where decisions affect us is as wide as ever. There is lack of political leadership with clear political accountability, identifiable by the people, who will give life to a European democratic space, where EU issues can be debated and where people can express their will. The institutional innovation of the European Council President may be seen as an attempt to create a notion of centralised public authority, but it is not apparent how decisions by a top-tier structure will address democratic legitimacy concerns, if the locus of decision-making is to shift further away from the EU citizens.

Another paradox of the system is that while the Commission has the executive functions of a national government, it is not the Union's political government; it lacks a political base, political accountability and, thus, visibility with the

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[1] W.Wessels, 'The Constitutional Treaty – Three Readings from a Fusion Perspective', (2005) 43 JCMS 11-36, p.11.
[2] J.Gerkrath, 'Representation of Citizens by the EP', (2005) 1 EuConst 73-78, p.78. B.Laffan, 'The European Union: a distinctive model of internationalization', (1998) 5 JEPP 235-253, p.241.

citizens. Its governmental role is further disputed by the existence of multiple executive actors, especially the President of the European Council. If the TeCE enters into force, the EU will emerge as a 'two-headed' power structure.[3] To a certain extent, the Commission has lost its political neutrality as its members and President are formally approved by the EP. A direct linkage between the election of its President and the outcome of the EP elections would further enhance its political base. This does not require any treaty reform; all that is needed is for political parties contesting the European elections to nominate their candidates, allowing the voters to consider the choices by somehow linking EP candidates to the candidates for the Commission presidency, while the elected MEPs will have to approve the nomination put forward by the European Council.

Moreover, there is no European political space that will give life to a European democratic area in which opposing points can be heard; there is no forum of political debate reflecting ordinary people's concerns. Political representation and control need to happen at the place where decisions are taken. Procedural improvements, such as the opening up of the deliberations of the legislative Council, may bring greater transparency to the workings of the EU institutions and may expand public knowledge of European issues, but within the Council - and the European Council – it is national rather than common European interests that are heard. Because of its political neutrality, the Commission has not been particularly eager to host public debates, at least not until its recent initiative for dialogue, debate and democracy in Europe.[4] Even so, such initiatives are characterised by lack of leadership and they appear less of a genuine effort to engage into a debate with the public and more of an attempt by individual institutions to promote their institutional significance in major European issues. As for the European Parliament, which for many years has been a place where national interests are fought over, it has not yet developed into a chamber for European debates which mirrors the role played at national level by national

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[3] The Strauss-Kahn Report, *Building a political Europe-50 proposals for tomorrow's people*, April 2004, pp.51 and 58.

[4] COM(2005) 494, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Plan-D for Democracy, Dialogue and Debate, 13.10.2005. SEC(2005)985, Action Plan to improve communicating Europe by the Commission, 20.07.2005.

parliaments. And when political debate does take place, only rarely it is reported to the general public by the media.[5]

Currently, it is the Member States that decide the procedure for treaty ratification and it is national politicians who set the terms of the domestic political debate on European questions. The democratic performance of the EU varies across institutions and levels of governance, but the all important perception of the democratic legitimacy of the EU institutions is mediated through national political classes, combating where necessary the prejudices and over-simplifications of the tabloid press.[6] The detrimental implications of this state of affairs to the latest ratification process were analysed in Chapter 7. Besides, the question is not whether Member States can control the EU institutions, but whether citizens can control the EU institutions as well as their national governments who combine to exercise EU powers. The Union needs to advance towards a *European* political life.

At the time of writing, the future of the Constitutional Treaty remains undecided. There is no shortage of proposals, ranging from the need to reassess the method of institutional change to possibly rethink the *raison d'etre* of the EU enterprise, and so on. Finding the best path ahead for the EU is undeniably a challenging task, but one need not 'reinvent the wheel'. The negative referenda results raise fundamental questions about the ultimate role of the Union's institutional system and processes in facilitating the participation and representation of the public. But what post-referenda assessments also show, from the Maastricht all the way to the TeCE ratification process, is that national democracies have been going through a crisis of confidence similar to the EU. People respond negatively, because they feel they are not duly represented and heard by their national institutions. To deal with their fear of the divine, the Greeks and Romans personified their gods to comprehend their demeanour, but what they naturally saw reflected back was all the weaknesses of human nature. This projected anthropomorphism led to a misapprehension of the divine and made people even more distrustful of and often angry and frustrated with the gods. With all its

[5] The Strauss-Kahn Report, op.cit. n.3, p.58.
[6] Ibid, p.50.

deficiencies, the Union has fallen victim to the same fallacy of personification. The average European public has little awareness of the EU, its processes and institutions, usually filtered through national politics and media. So, it attributes to this vague system of governance features that typify national democratic governments, but what it sees reflected back is all the flaws of national democracies. It is a fact of human nature to project the familiar onto the unknown. The Roman gods never existed, but the Union does and, as long as it aspires to be a union of both states and peoples, it has a duty to form European awareness, to create an authentic 'democratic life of the Union', a *virtual* – not just structural – democracy, where political representation and control takes place. In the absence of conditions of connectedness between European citizens and this extra level of decision making (EU level) the future will always be volatile for the Union's regime.

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